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No. 366

IN THE

Supreme Court of the United States

October Term, 1958

JESSIE BALL DUPONT, EDWARD BALL, FLORIDA NATIONAL BANK OF JACKSONVILLE and ELBERT DENT, as TRUSTEES of the Testamentary Trust Created under and by Virtue of the Last Will and Testament and Codicils thereto of ALFRED I. DUPONT, Deceased and EDWARD BALL, ROGER L. MAIN, JESSIE BALL DUPONT, HOWARD S. WHEELER, PAUL L. PIERCE, CLYDE C. PIERCE, WALTER P. FULLER, S. WALLACE SHAFER, ST. JOE PAPER COMPANY, LEEDY, WHEELER & ALLEMAN, INC., and CLYDE C. PIERCE CORPORATION, *Petitioners*

v.

THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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EXPLANATORY NOTE

1. Except where a clear intent is shown to the contrary, the term "respondents" as used herein means The Crummer Company and R. E. Crummer & Company, plaintiffs in the District Court and successful appellants in the Court of Appeals.

2. Except where a clear intent is shown to the contrary, the term "petitioners" means all the petitioners named as such in the petition for writ of certiorari, acting in furtherance of a conspiracy in violation of the federal antitrust laws to the injury and damage of the respondents. The petitioners were defendants in the District Court and appellees in the Court of Appeals.

3. Except where a clear intent is shown to the contrary, the term "District Court" as used herein means The United States District Court for the Northern District of Florida, Judge Dozier A. DeVane presiding.

4. Except where a clear intent is shown to the contrary, the term "Court of Appeals" as used herein means The United States Court of Appeals for the Fifth Circuit.

5. The judgment of the Court of Appeals of which review is now sought (255 F. 2d 425) is the unanimous opinion of Hutcheson, C. J., Brown, J., and Tuttle, J., who wrote the opinion, which was entered May 8, 1958.

6. The prior judgment of the Court of Appeals, frequently referred to herein (223 F. 2d 238) is the unanimous opinion of Tuttle, J., Rives, J., and Hutcheson, C. J., who wrote the opinion, which was entered May 10, 1955.

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THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

This brief is filed by the respondents, The Crummer Company and R. E. Crummer & Company, in opposition to a petition for a writ of certiorari, wherein review is sought of a judgment of the Court of Appeals for the

Fifth Circuit holding that the District Court for the Northern District of Florida erred in directing a verdict against respondents, after four weeks of trial before the jury and after the jury had been given only three hours and forty-five minutes (divided into two days) in which to organize and deliberate (R. 3115-3120).

The effect of the decision of the Court of Appeals is that there was sufficient evidence submitted to the jury from which the jury could have found that respondents' cause of action for treble damages under the federal antitrust laws was not barred by the applicable statute of limitations.

At the outset, we emphasize that the decision of which review is now sought is not a final judgment in the case, but merely directs that the issues be tried to a jury.

At issue here is the sufficiency of evidence of fraudulent concealment to toll the Florida three-year statute of limitations. The application of all state statutes of limitation has been superseded now, however, by the 1955 act of Congress providing a four-year statute for civil actions under the federal antitrust laws.[1]

The period of time involved in the instant case is only five months, nineteen days beyond the Florida three-year statute.

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[1] 15 USCA § 15b. "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections. Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283."

Thus, the period of the interstitial application of state limitation statutes to the federal antitrust laws has ended as has the subsidiary problem of federal vs. state doctrines of fraudulent concealment. Cf. **Holmberg v. Armbrecht,** 327 U.S. 392.

OPINIONS BELOW

Opinions pertinent to this matter are:

The opinion of the Court of Appeals review of which is sought by the petition for writ of certiorari, 255 F. 2d 425, which is set forth in the appendix to the petition at pp. 8a-20a. The opinion of the District Court, 148 F. Supp. 255, reversed by the Court of Appeals, set forth in the appendix to the Petition at pp. 8a-20a. The opinion of the Court of Appeals, 223 F. 2d 238, pertinent portions of which are set forth in the appendix to this brief (App. A, pp. a2 and a3). The opinion of the District Court, 117 F. Supp. 870, the portion of which related to the present issue having been reversed by the Court of Appeals, 223 F. 2d 238. The order of the District Court denying petitioners' motions to dismiss respondents' complaint on the ground of failure to state a claim (not reported, but appearing at R. 450-453).

JURISDICTION

Respondents do not take issue with petitioners' statement of "Jurisdiction", stated on p. 2 of the petition. However, respondents will show that no contention in the petition for certiorari constitutes sufficient grounds for granting certiorari in this case.

STATUTES INVOLVED

Respondents' complaint is expressly predicated upon the statutes stated as being involved in petitioners' "Statutes Involved" (p. 14, Petition), but is also expressly predi-

cated upon Section 7 of the Sherman Act (App. C, p. a4) and Sections 12 and 14 of the Clayton Act, these latter two sections being inapplicable to the present issues.

QUESTIONS PRESENTED FOR REVIEW

Respondents regret that there is hardly a sentence contained in the Petition (pp. 2-4), "Questions Presented", with which they can agree. To specifically attack the inaccuracies sentence by sentence would unduly burden this Court. As respondents will point out with particularity in their "Statement of the Case" and "Argument", later in this brief, the only accurate statements contained in petitioners' entire "Questions Presented" are the statements contained in the first paragraph under that heading (Petition, p. 2) and the first two sentences of the third paragraph (Petition, p. 3).

This is essentially a fact case involving many complex stratagems and contrivances by which petitioners not only secretly launched a series of predatory attacks on respondents, but thereafter, acting together, they covered up their activities by a remarkable chorus of false statements under oath. They thereby successfully caused respondents' troubles to appear to be merely coincidental federal, state and private litigation with the petitioner-competitors at all times concealed. In the Appendix to this brief we have reproduced a short summary of the pleadings and a collation of the evidence as presented to the Court of Appeals in our brief below (App. G, pp. a40-a42, and App. E, pp. a6-a32).

Under Rule 42(b) F.R.C.P., the District Court ordered a separate trial of the issue of fraudulent concealment. The District Court also entered a pretrial order under Rule 16 F.R.C.P., directing that the conspiracy and

the damages need not be proved. Construing his own orders, the District Court ruled that truth or falsity of the Main-Wheeler complaint was not an issue to be tried and that the "merits" of the case would not be heard.[2] Therefore, as the petitioners come before this court, they are complaining largely that the District Court should have construed his own orders in a different way in this fragmentary trial.

As to the claim here advanced that there is "no basis for liability", we advise the court that the sufficiency of the complaint was formally upheld by the District Court in an order dated September 8, 1953 (R. 450-453) and petitioners have not questioned that ruling on either of two appeals to the Court of Appeals. Therefore, the question which petitioners are now stretching to reach, the matter of liability for instigation of governmental action, is not here either from the standpoint of procedure or from the standpoint of sound policy in Supreme Court consideration of questions not fully developed below.[3] Obviously the legality of instigation of governmental action may depend, in part, upon the context in which the deed was done, and upon the totality of defendant's conduct. In this case, discovery on the merits has been arrested since December, 1953 and no discovery has been had against some of the principal defendants.[4]

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[2] See footnote 9, page 16 of this Brief.

[3] Evidently the District Judge himself was not too well satisfied with the usefulness of the separate trial in this particular case for he made formal announcement for the benefit of his own successor in office, and for the benefit of the parties, that if the cause should be reversed, he would try limitation right along with the merits. (R. 3122.)

[4] No discovery **on the merits** by deposition or the production of documents has yet been had from Edward Ball, nor the other Ball-duPont defendants, nor from the Leedy-Wheeler defendants (R. 2154), all discovery having been suspended since December

Respondents' challenge to the tendered questions, briefly stated, is: the issue of frauduent concealment does not turn on a "single overt act"; the "truth or falsity" contention was ruled upon by the District Court contrary to petitioners' argument; "non-disclosure" is not even referred to in the opinion of the Court of Appeals; "liability under the antitrust laws" was eliminated as an issue by at least two prior decisions unappealed from; and the reasons given by the district court for directing the verdict are immaterial.[5]

The only question presented upon review of the judgment entered upon an order directing a verdict for the

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1953. Following respondents' unsuccessful Mandamus and appeal contesting the transfer of the case from the Southern District of Florida to the Northern District, **The Crummer Company, et al v. Jessie Ball duPont, et al,** 5 Cir., 196 F. 2d 468 (1952), certiorari denied, 344 U.S. 856 (Oct. 1952), the district court properly called for arguments on the pleadings beginning August 31, 1953 (R. 453). He directed further arguments on December 1, 1953 on the issue of fraudulent concealment, and on January 15, 1954, dismissed the case on the pleadings as barred by the statute of limitations (R. 468). This was reversed, **The Crummer Company and R. E. Crummer Company v. Jessie Ball duPont, etc., et al,** 5 Cir., 223 F. 2d 238 (1955), certiorari denied, 350 U.S. 848 (Oct. 1955). At the first pretrial conference, thereafter, June 19, 1956, the district court announced that he considered that the Court of Appeals had ordered a separate trial of the limitation issue (R. 474) and he orally instructed counsel for the parties that there would be no discovery depositions and no further motions to produce upon the main issue of the case, i.e., the merits (R. 484; 507). Subsequently, at the second pre-trial conference, September 25, 1956, the district court entered an order allowing certain depositions "limited" to the single issue of fraudulent concealment to proceed (R. 502; 503). This order is still outstanding.

[5] Vol. 5A **C.J.S.,** Appeal and Error, § 1671a; **Gunning v. Cooley,** 281 U.S. 90 (1930); **Empire State Cattle Co. v. Atchison T. & S.F. R. Co.,** 210 U.S. 1, (1907); **Phillips Petroleum Co. v. Gibson,** 5 Cir., 232 F. 2d 13 (1956).

petitioners (defendants in the District Court) is well expressed by Circuit Judge Tuttle in writing the opinion for the unanimous Court of Appeals:

> "The question presented is whether there was any evidence from which the jury could have found fraudulent concealment of the cause of action, for if there was then the trial court could not properly take that issue from the jury." (255 F. 2d 425, 426.)

STATEMENT OF THE CASE

In order to supply omissions and to correct inaccuracies in petitioners' "STATEMENT", beginning on page 4 of the petition, the respondents deem it necessary to restate the case rather than to take issue with various specifics of the petitioners' "STATEMENT".

The respondents filed their original complaint on December 19, 1949, seeking treble damages in the total amount of $30,000,000.00 for injuries inflicted upon them by a combination and conspiracy of and among the petitioners in violation of the federal antitrust laws. The complaint alleged the beginning of the conspiratorial activities early in the year 1941 and that injurious acts largely destroyed the business of the respondents as dealers in municipal bonds (R. 71-77). The several petitioners filed motions to dismiss on the ground that the action was barred by the three-year Florida statute of limitations (Fla. Stat. Ann. § 95.11 (5)(a)). The petitioners also filed motions to dismiss on the ground that the complaint failed to state a claim. After extensive argument, the motions to dismiss on the basis of failure to state a claim were denied by the District Court by order entered on

September 8, 1953 (R. 450-453). Subsequently, the District Court held that the Florida three-year statute of limitations was applicable and that the statute of limitations began to run on June 30, 1946, the date of the end of the Federal Moratorium Act, unless the statute was tolled by fraudulent concealment on the part of petitioners (R. 453-454).

Thereafter, the District Court held that the complaint did not allege sufficient facts to raise the issue of fraudulent concealment and dismissed the complaint (R. 454-468). Subsequently, the District Court also dismissed an amended complaint, in which the respondents alleged, with great particularity, the myriad of facts and circumstances relating to fraudulent concealment (R. 468-471). The respondents appealed to the United States Court of Appeals for the Fifth Circuit, and that Court reversed the District Court on the issue of fraudulent concealment and held that the amended complaint alleged sufficient facts to raise an issue of fraudulent concealment. 223 F. 2d 238, (1955). In reversing the District Court, the Court of Appeals, in its 1955 decision, clearly defined the meaning of the term "fraudulent concealment" as it applies in the instant case (App. A, p. a2), and held squarely that the issue was one which could not be decided by a court but must be decided by a jury (App. A, p. a2). The present respondents petitioned this Court for a writ of certiorari, seeking review of the Court of Appeal's ruling on issues other than fraudulent concealment. The writ was denied (350 U.S. 848). The present petitioners did not seek review of the clear-cut holdings of the Court of Appeals in its 1955 decision in this case; nor did the petitioners seek review of the order

of the District Court denying their motions to dismiss on the ground of failure to state a claim.

When the case was remanded to the District Court for trial by a jury, that court ordered that there would be a separate trial only on the issue of fraudulent concealment (R. 481, 484). Upon a pretrial hearing on September 25, 1956, the District Court entered a formal pretrial order (App. D, p. a5; R. 501, 502) that upon the trial of the single issue of fraudulent concealment it would not be necessary for respondents to prove that a conspiracy to violate the antitrust laws existed among the petitioners or that damages were sustained by the respondents as a result of the conspiracy. This pretrial order was the only formal pretrial order entered by the court pursuant to Rule 16, F.R.C.P., affecting the trial of the single issue. This order was never modified or amended throughout the course of the trial.

Petitioners repeatedly refer to a pretrial statement of the issues (R. 519) submitted to the court during pretrial conferences. This pretrial statement, an informal document for the preliminary enlightenment of the court, did not take the position that respondents based their claim solely on the filing of a memorandum by Main and Wheeler with the Post Office Department on May 21, 1941. It was not intended by respondents as any limitation of their detailed Amended Complaint and the District Court did not so rule during the trial. Throughout the trial respondents made very clear to the court that in addition to the Post Office Department-Securities and Exchange Commission episodes of fraudulent concealment, respondents would prove, and they did prove, the concealment of the activities of petitioners with

respect to rulings of the Florida Securities Commission which denied The Crummer Company a license to do business during 1943 (R. 2398-2408).

During the trial, the respondents made clear that they would prove, and did prove, the activities of the petitioner Fuller, in the course of the conspiracy with the other petitioners, in violation of the federal anti-trust laws, which resulted in damage to the respondents (R. 2405-2410). The respondents further proved that these acts were fraudulently concealed from them by the petitioners and were not discovered until within three years next preceding the filing of their complaint. (App. E, pp. a6-a32, incl.; App. F, pp. a33-a39, incl. See also R. 3104-3111 and R. 2384-2441, especially R. 2437.)

Five days after the trial (R. 3121) the District Court filed his memorandum opinion stating that respondents relied solely upon the Main-Wheeler memorandum (Petition App., p. 6a) and, indeed, that plaintiffs had abandoned all other overt acts (Petition App., p. 2a). This statement was contrary to respondents' intention and understanding as well as contrary to the trial as conducted. Respondents appealed to the Court of Appeals on the whole case insisting that they had proved the material allegations of their entire amended complaint, and the court agreed, as is clearly apparent from its opinion.

Moreover, respondents' amended complaint does not show that they had knowledge since early 1945 that some such memorandum had been filed (R. 87-89). Moreover, respondents' pretrial statement of the issues is not based upon a contention that the petitioners failed to disclose their actions, as contended by the petitioners at the top of page 6 of the petition, but was predicated upon affirmative acts of fraud-

ulent concealment on the part of the petitioners (R. 519-525; 86-90). The respondents took the position that the truth or falsity of the memorandum was irrelevant and immaterial (R. 522), a position which was sustained both in the District Court[6] and in the Court of Appeals. At this point, we respectfully direct the Court's attention to footnote one on page 6 of the petition, wherein is cited a prior decision of this Court in no way relevant or material to the present issue. The case is *American Insurance Company v. Avon Park*, 311 US 138. Not only is that decision completely immaterial, but it is cited solely for the purpose of prejudice.[7]

At the trial, the respondents proved fraudulent concealment, lack of knowledge, diligence, and discovery within the three years next preceding the filing of their complaint. This proof was found sufficient by the Court of Appeals to withstand a directed verdict and is well expressed in the 1958 opinion of the court of appeals (255 F. 2d 425, pp. 428-431). Respondents did not contend that they "were unaware only of the identity of the persons who had filed the information with the Post Office Department". (Petition p. 7)

The issue of fraudulent concealment was tried before a jury which never reported to the District Court that they were unable to agree. The fact is that after four weeks of testimony before a jury, and when the jury had been given only a total of three hours and forty-five minutes to organize

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[6] See footnote 9, page 16 of this Brief.

[7] Moreover, the decision did not represent the culmination of the litigation therein involved. **Ware v. R. E. Crummer & Co.**, 5 Cir., 128 F. 2d 114 (1942).

and deliberate (and that little time was divided into two days), the District Court called in the jury and merely asked if the jury had arrived at a verdict, to which the foreman replied, "We have not, Your Honor". (R. 3119-3120). Whereupon, without further ado, the District Court summarily directed a verdict against the plaintiffs.

Of course, on appeal, it is immaterial what grounds the district court gave for directing the verdict.[8]

The concluding paragraph of petitioners' "STATEMENT" (Petition - p. 8) inaccurately interprets what the Court of Appeals held in reversing the judgment entered upon the directed verdict. The Court of Appeals held, inter alia:

1. That there was sufficient evidence before the jury from which the jury could decide that the petitioners fraudulently concealed from respondents their cause of action under the antitrust laws; that respondents here had no knowledge of their cause of action within three years next preceding the filing of their complaint; that the respondents here were diligent in their efforts to discover the facts constituting their cause of action; and that respondents did not make their first discovery relating to the facts which constituted their cause of action until within three years next preceding the filing of their complaint.

2. That, as the Court of Appeals had previously held, the issues were such and the evidence was such as to require the determination of the issues by a jury and not by a court.

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[8] See footnote 5, page 6 of this Brief.

SUMMARY OF THE ARGUMENT

The sole question is whether there was any evidence from which the jury could have found for the respondents. This question was resolved in favor of the respondents in a well reasoned and thoroughly documented decision by the Court of Appeals.

The petitioners for certiorari seek to obtain review by this Court by contentions that were decided against the petitioners in prior judicial rulings from which the petitioners failed to seek timely review. Moreover, the petitioners have misconstrued the basis of the decision of the Court of Appeals. The petitioners have failed to accept the law of the case when it went to trial, as well as the rulings of the District Court from which they failed to appeal.

The petition relies upon three "reasons". The first two reasons are not only impertinent and immaterial to the one true issue involved, but are in direct conflict with the law of the case as firmly established by judicial decisions of which petitioners sought no timely review. Moreover, petitioners' first two reasons are not "important questions" as contemplated by this Court's Rule 19, 1. (b).

The third and final "reason" assigned by petitioners (alleged conflict between the Fifth and Ninth Circuits), misconstrues and misapplies both of those decisions. Each case turned upon questions of fact determinable from the record. Each court placed its own construction on the proof in that particular case. No basic question of law is raised save and except the sufficiency of the evidence. There was no jury in the Ninth Circuit case and the court there found

that there was undisputed evidence of knowledge by the plaintiff of a cause of action under the federal antitrust laws. There is no conflict of law between the two decisions and no purpose would be served by a review by this Court on this contention.

ARGUMENT

I.

Petitioners Reason I. (Petition page 8) is stated as follows:

> "An important question is raised by the holding below that the submission of information to a federal law enforcement agency can constitute a violation of the antitrust laws for purposes of tolling the statute of limitations under the doctrine of fraudulent concealment."

The above contention is predicated upon a number of erroneous conclusions by the petitioners.

The first contention is predicated upon the assumption that the submission of a certain memorandum to the Post Office Department by the petitioners Wheeler and Main did not constitute an act of conspiracy and did not constitute an act of fraudulent concealment. We point out again that the respondents have never contended that that specific act complained of was the total predicate for their case. The surrounding circumstances, extending over a period of years, relating to the Post Office Department and Securities and Exchange Commission episodes were the basis for this particular act of conspiracy and act of fraudulent concealment. (App. E, p. a6, et seq.) The District Court was clearly in error and the Court of Appeals was clearly

correct in reversing that error, because the law of the case, unappealed from, had already been well settled. The law of the case, when it went to trial before the jury, was the law as expressed in several pertinent rulings and decisions:

1. The decision of the District Court entered September 8, 1953, (R. 450-453), holding that the complaint stated a claim, the attack made upon the complaint being a motion to dismiss predicated in a large part upon the same argument being made by petitioners in their Reason I. Petitioners did not seek a review of this decision.

2. In the 1955 decision of the Court of Appeals reversing a decision of the District Court holding the action barred by the statute of limitations (223 F. 2d 238. App. A, pp. a2-a3), the Court of Appeals, as against the very same contentions being made in petitioners Reason I, held in part:

> " . . . we think it quite clear that plaintiffs' amended complaint does well state their claim, that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it . . ." (223 F. 2d 238, 248)

Thus, respondents' principal burden upon the jury trial was to prove facts from which a reasonable inference could be drawn that the conspirators secretly moved against the respondents "under the guise and protection of the public interest and through the public authorities", and, by so doing, the petitioners "fraudulently intended to and did conceal the scheme and their participation in it". Further-

more, the Court of Appeals held that this issue could *only* be determined by a jury and not by a court (223 F. 2d 249. App. A, p. a2).

3. On September 25, 1956, the District Court entered the only formalized pretrial order, pursuant to Rule 16, F.R.C.P. (App. D, p. a9; R. 501-502) The effect of this order was that, for the purposes of the trial on fraudulent concealment, the conspiracy as alleged in the amended complaint was taken as if proved. The result of this order, taken alone if necessary, is sufficient to negate petitioners' Reason I. In other words, what the petitioners are really insisting upon is a ruling upon the conspiracy issue and not upon the question of fraudulent concealment. Certainly, a District Court cannot ignore a formal and conclusive pretrial order unless expressly modified at the trial pursuant to Rule 16, F.R.C.P.

4. The law of the case was well established contrary to the repeated contention of the petitioners that the memorandum filed with the federal government was presumed, for the purposes of the trial, to have contained no false material. This contention is precisely contrary to the law of the case, both as established by the Court of Appeals' 1955 decision and by the rulings made by the District Court. The issue of truth or falsity was not a matter before the court upon trial.[9] Proof of truth or falsity, would, of course, entail

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[9] Pursuant to the pretrial order of September 25, 1956, (R. 501-502) the District Court frequently during the trial admonished all counsel that the question of truth or falsity of the statement contained in the petitioners' Main-Wheeler memorandum was in no respect an issue in this separate trial of fraudulent concealment (R. 1107; 1416; 2296; 2672).

During the trial, duPont counsel requested a stipulation "that there is no evidence of record showing that the complaint filed

proof of the conspiracy itself. This was neither required nor permitted.

5. In support of their Reason I, Petitioners argue at length the law of privilege. By a non sequitur they urge the importance of their tendered problem by reference, on page 13 of their petition, to a group of cases involving governmental action in a variety of ways, but none of them concerning, discussing or deciding any question of an informer's privilege (which is really the privilege of the government). In addition to the fact that these matters were decided after full argument on the Pleadings by the District Court on September 8, 1953 (R. 451) from which Petitioners did not appeal, there is the further fact that Petitioners' Motions to Strike based upon the claim that "the matters therein set forth were privileged and were not admissible" (R. 707) were overruled by the Court (R. 729) from which ruling Petitioners again did not appeal to the Court

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by Main and Wheeler with the Post Office Department in May 1941 was false" (R. 2295). The court responded, "well, I think they did have to do that in a little different way, which it ought to be—I mean if there is any reason for having a stipulation". The court added: "I have held and ruled that the question of the truth or falsity of that statement could not get into this case, and there is no evidence supporting either side on that question of truth or falsity in the record that's been made before this jury, but that is based all together on the Court's ruling, because you did your best to persuade the Court to let you get into it, and I refused to do it." (R. 2296). Both sides conceded that this was so (R. 2296). Thereafter, respondents' counsel, in the conduct of their case, studiously avoided reference to the truth or falsity of the Main-Wheeler complaint, urging then, as they do now, that there was no question, upon the trial of the single issue of fraudulent concealment, as to the lawfulness or unlawfulness of the act of Main, Wheeler, and the other petitioners.

Furthermore, the court frequently ruled during the trial that testimony pertaining to the "merits" of the case would not be admissible (R. 1128; 2100; 2043).

of Appeals, either by cross-appeal or by otherwise challenging this action by the District Court.

The matter which Petitioners now seek to raise in their Point I, the question of ultimate liability, was not actually litigated in the separate trial below which, as stated, avoided the merits of the case at the direction of the District Court. (R. 501-502. 1128; 2100; 2043) If the case had been on the merits, instead of the academic discussion now tendered by Petitioners as to whether the Main-Wheeler memorandum *could* under any hypothesis be an actionable mater, and if the matter of privilege were fully developed factually, properly ruled upon, and claimed error appealed, we would have a far different question to pass upon as is revealed even by this fragmentary record. This is so because:

1. The privilege here invoked has been established to be the privilege of the government, even by the very authorities cited by Petitioners. *Roviaro v. United States*, 353 U.S. 53, 59.

2. The scope of the privilege, being limited by its underlying purpose, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. *Roviaro v. United States, supra*, 353 U.S. 53, 59.

3. The postal regulations applicable to the case, noted in the Petition, p. 11, Note 5, refers to the disclosure of information "without authorization" of the Post Office Department.

4. In the practical application of the privilege, there is a further fundamental requirement of fairness and

the privilege gives way to this conception in appropriate cases. *Roviaro v. United States*, 353 U.S. 53, 60-61.

This record shows that the identity and act of Respondents Main and Wheeler became first disclosed on December 27, 1946 and thereafter by initial revelations during the testimony of a Post Office official before a Sub-Committee of the United States Senate (App. E, pp. a19-a20), and the facts were subsequently confirmed by the testimony of both Main and Wheeler (R. 923-932, 969-980). Thus the facts were made a matter of public record in an investigation relating to the Municipal Bankruptcy Act and the credit of the taxing units of the State of Florida.[10]

Later, during this litigation, the Post Office Department files which disclosed Main and Wheeler and their contact with the Department were made available in this case upon a joint request of all parties to this case during a discovery deposition (R. 756-757, 1292-1293). See especially statement of duPont counsel at Record, p. 757, to the effect that the Post Office Department produced the documents following the request of all parties.

[10] Subcommittee of the Committee on the Judiciary of the United States Senate authorized by Senate Resolution 35, 79th Cong., 1st sess. (R. 3183), said resolution authorizing and directing the Subcommittee to investigate the activities of the Securities and Exchange Commission and the Post Office Department to determine whether, "(a) the activities of said agencies, through their representatives, are crippling, hampering, or rendering ineffective the Municipal Bankruptcy Act, as amended, heretofore enacted by Congress; and (b) whether or not the activities of said agencies, through their representatives, are unfairly resulting in undermining the credit of the taxing units of the State of Florida." (R. 3183-3184); sometimes referred to in this brief and its appendix as "The McCarran Committee" or "Senate Committee", the report of that committee is often termed "The Green Books" in the record.

Thus even on this fragmentary record, it is apparent that the question of privilege is fraught with questions of extinguishment, both by the events of history and by the conduct of Petitioners themselves.

The conversion of the privilege against non-disclosure into an immunity from liability concerns trial on the merits in which the totality of Respondents' conduct and the motives with which they acted will control this ultimate question.

In connection with the merits, and Petitioners' final argument in behalf of public policy, it must be remembered that acts which are lawful in themselves become unlawful when accomplished pursuant to an unlawful conspiracy.[11] Where a conspiracy exists (deemed to be proven by virtue of the pre-trial order R. 501-502), the act of any conspirator at any time in furtherance of the conspiracy is the act of all.[12] These well developed doctrines

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[11] **Swift & Co. v. U. S.**, 196 U.S. 375, 396 (1905); **Falstaff Brewing Corp. v. Iowa Fruit & Produce Co., 8 Cir.**, 112 F. 2d 101, 108 (1940); **Scavenger Service Corp. v. Courtney**, 7 Cir., 85 F. 2d 825 (1936); **Winkler-Koch Engineering Co. v. Universal Products Co.**, D.C.N.Y., 79 F. Supp. 1013 (1947); 15 **C.J.S.**, Conspiracy §§ 3, 4, pp. 998-1000. See also footnote 15, page 24 of this Brief.

[12] **McCandless v. Furlaud**, N.Y., 296 U.S. 140 (1935), reversing 2 Cir. 75 F. 2d 977 (1935); certiorari granted, 295 U.S. 726 (1935), and rehearing denied, 296 U.S. 664 (1935); **Harriss v. Indemnity Ins. Co. of North America**, 2 Cir., 93 F. 2d 459 (1937), certiorari denied, 303 U.S. 645, (1938); **Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.**, Cir., 78 F. 2d 333, 98 A.L.R. 133 (1934), affirming, 1 F. Supp. 576 (1932), certiorari denied, 294 U.S. 719 (1935); **United Electric Coal Co. v. Rice**, D.C., Ill., 22 F. Supp. 221, 226 (1938); **Lynes v. Standard Oil Co.**, D.C.S.C., 300 F. 812, 817 (1924); **U. S. v. Railway Employees' Department of American Federation of Labor**, D.C. Ill., 283 F. 479 (1922); **Hamilton Inv. Co. v. Bollman**, 7 Cir., 268 F. 788 (1920), certiorari denied, 225 U.S. 571 (1921).

are a necessary part of the effective enforcement of the federal antitrust laws which is itself a matter of great public importance and over-riding public policy.

Finally, again reiterating, Petitioners' statement that the entire case depends upon a single act of conspiracy is one refuted by the record. The three major fields of activity which injured the Respondents, and which were proven as fraudulently concealed, are set forth on pages 9, 10, 11, 27 and 28 of this brief. We refer the Court again to the collation of the fraudulent concealments regarding activities in these fields (App. E, pp. a6-a32).

II.

Petitioners' Reason II (Petition - page 15) is stated as follows:

> "An important question is raised by the holding below that failure to disclose the filing of the memorandum by petitioners Main and Wheeler with the Post Office Department could, without proof of fraud or contrivance, constitute fraudulent concealment."

The above contention is predicated upon several erroneous conclusions in direct conflict with the following facts:

1. Respondents did not rely upon concealment "only by silence", but concealment through an entire scheme and chain of circumstances sufficient to satisfy any test of fraudulent concealment.

2. The Court of Appeals nowhere stated its reliance upon "the mere failure to disclose."

3. There was definitely no assumption that the memorandum filed with the Post Office Department by the peti-

tioner was true. This was clearly established, both by the rulings of the District Court[13] and by the 1955 decision of the Court of Appeals (223 F. 2d 238, 248).

4. Here again, the petitioners completely disregard the pretrial order of the District Court (App. D, p. a5; R. 501-502).

5. The petitioners again misconstrue and misapply the decision of the Court of Appeals, review of which is now sought. The court merely reiterated its earlier decision defining fraudulent concealment as it applies in this case, and concluded by stating in the last paragraph of that decision:

> "we think they have shown *sufficient facts* which, when coupled with the assumptions that we must make on the record, entitle them to have a jury trial on the question of fraudulent concealment." 255 F. 2d 425, 433. (Emphasis supplied)

Respondents include in their appendix to this brief some of the activities of petitioners, which were definitely proved, as establishing facts sufficient to sustain a jury finding in their favor. (App. E, pp. a6-a32 and App. G, pp. a40-a42 incl.)

6. On page 17 of their petition, petitioners cite four cases, two from the Ninth Circuit, one from the Tenth Circuit and one from the United States District Court of Massachusetts. These cases are inapplicable on their face. The question involved in those cases was the selection of the applicable state statute of limitations. The holdings were that an action for treble damages under the anti-trust laws is not an action for fraud, so as to make the

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[13] See footnote 9, page 16 of this Brief.

state statute of limitations, for actions for fraud, applicable. The instant case is one in which the applicable state statute of limitations has been established and the only question is whether there was fraud in the concealment. Certainly, the evidence set forth in the portion of the appendix referred to in paragraph five above demonstrates facts from which the jury could have found for the plaintiffs on the issue of fraudulent concealment.

7. On pages 18 and 19 of the petition, petitioners attempt to equate this civil action with decisions in criminal cases under the federal antitrust laws. This analogy has been repeatedly rejected.[14]

8. An act which is *secretly* performed pursuant to an admittedly unlawful violation of the federal antitrust laws, which is a part of a proven conspiracy and is per-

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[14] The continuing conspiracy theory of the criminal antitrust cases does not apply to civil antitrust cases so as to extend the statute of limitations. **Northern Kentucky Telephone Co. v. Southern Bell T. & T. Co.**, 6 Cir., 73 F. 2d 333 (1934); **Momand v. Universal Film Exchanges**, 1st Cir., 172 F. 2d 37 (1948); **Foster & Kleiser Co. v. Special Site Sign Co.**, 9 Cir. 85 F. 2d 742 (1936); **Emich Motors Corp. v. General Motors Corp.**, CCH Trade Cases, Par. 67960 (D.C. Ill. 1955).

When respondents appealed the earlier decision of the District Court, 117 F. Supp. 870, respondents insisted upon their theory, as expressed in paragraph 46(b) of their complaint:

> "The claim of each plaintiff herein is a single cause of action arising from the defendants' preconceived single course of continuing conduct from which the damages are indivisible and incapable of apportionment with respect to any of the particular injurious acts complained of." (R. 79-80)

The Court of Appeals rejected this contention, stating:

> "We find ourselves in full agreement with appellees' (petitioners') theory. Indeed, we know of no principle on which the appellants' (respondents') theory could rest." 223 F. 2d 238 at page 248. Cert. Den. 350 U.S. 848 (1955); parenthetical expressions supplied.

formed under circumstances demonstrating a malicious, vindictive, and injurious series of acts certainly partakes of fraud insofar as that term is used in the sense of "fraudulent concealment". An action of conspiracy to the damage of the plaintiff consists of "a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose not in itself unlawful by unlawful means."[15]

9. The ancient doctrine of *Bailey v. Glover*, 88 U.S. 342, (1875) to the effect that the deliberate launching of a self-concealing scheme satisfies the doctrine of fraudulent concealment has been applied to antitrust cases. *American Tobacco Co. v. Peoples Tobacco Co.*, 5 Cir., 204 Fed. 58 (1913). Cf. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Errion v. Connell*, 9th Cir., 236 F. 2d 447 (1956). But respondents did not stop there in their proof. Respondents went further and proved supplemental, additional and effective ruses, tricks and contrivances, particularly in the form of false testimony

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[15] 15 **C.J.S.**, Conspiracy, § 1, page 996; 11 **Am. Jur.**, Conspiracy, § 3, page 543, and cases there cited.

It is the existence of conspiracy which converts the harmless conduct of one person into a public wrong when there is concert with many. **Grenada Lumber Co. v. Mississippi**, 217 U.S. 433, 30 S. Ct. 535, 54 L. Ed. 826 (1910). Likewise, and most important, perfectly lawful and innocent acts, not torts in themselves, become actionable if they are bound together by a conspiratorial scheme. **Bedford Cut Stone Co. v. Journeymen Stone Cutters Assoc.**, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927). Even constitutionally protected conduct may become actionable as a part of a conspiracy. **Aiken v. Wisconsin**, 195 U.S. 194, 25 S. Ct. 3, 49 L. Ed. 154 (1904), as may the conspiratorial exercise of statutory rights and privileges. **Kobe, Inc. v. Dempsey Pump Co.**, 10 Cir., 198 F. 2d 416 (1952), cert. den. 344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952). (The bringing of a patent suit as a part of a conspiracy, even though the suit was believed to be a sound one.)

under oath whereby even petitioners' requirements for affirmative acts, tricks and contrivances are well satisfied by the evidence in this case (App. E, pp. a6-a32, incl.). These tricks and contrivances prevented discovery and knowledge and are sufficient to satisfy even the most rigorous requirements.

10. Petitioners' last contention under their argument in support of their Reason II represents a misconception of the case. It must be remembered that the public interest is directly affected by private enforcement of the antitrust laws. Likewise, as we have pointed out hereinabove, petitioners are again attempting to raise the questions of privilege and immunity which have been squarely decided against them and from which decision no timely review was sought.

We respectfully refer the Court to our earlier discussion of the law of the case as fixed by rulings from which the petitioners sought no timely review. (pp. 15-17, this brief).

III.

Petitioners' Reason III for granting the writ is set forth on page 21 of the Petition as follows:

> "The holding below that Respondents lacked knowledge of their claim because they were unaware of the identity of the persons making representations to the Post Office Department is in conflict with a decision of the Court of Appeals for the Ninth Circuit."

The argument in support of Reason III as presented by petitioners is based upon an alleged conflict between the

ruling of the Circuit Court of Appeals for the Fifth Circuit in the instant case, and that of the Circuit Court of Appeals for the Ninth Circuit in *Suckow Borax Mines Consolidated v. Borax Consolidated Ltd.*, 185 F. 2d 196 (1949).

The facts in the two cases are in no way comparable. Knowledge by the plaintiff in that case of the details of a cause of action *under the federal antitrust laws* was proved by express admissions. As was pointed out by Circuit Judge Tuttle in the unanimous decision of the United States Court of Appeals for the Fifth Circuit (255 F. 2d 425), the question of knowledge in the instant case was whether or not the respondents here had knowledge of this cause of action; namely, a cause of action against the petitioners for a conspiracy among the petitioners and initiated by respondents' most vigorous competitors to violate the antitrust laws, which conspiracy caused the respondents to suffer damage. The fact that petitioners could see the government agents, state or federal, in their attacks upon petitioners did not give knowledge that these activities were instigated and caused by private competitors acting in conspiracy among themselves. The connection between the private competitors (acting together) and the government agents is the thing which defied discovery notwithstanding prodigious efforts by experienced, able attorneys, as recited by the Court of Appeals.

In contrast, the *Suckow* case was a situation in which plaintiffs knew for a generation, and even charged in and out of court, that defendant there had set upon plaintiffs pursuant to a conspiracy to monopolize borax in the world markets. Plaintiffs there had gone so far as to execute two releases in favor of the defendant-competitors,

releasing all claims against them. Accordingly, the factual difference between the cases is sharp and decisive as the Court of Appeals below held.

A reading of the *Suckow* decision at 185 F. 2d 196 will reflect that a basic predicate for that decision was that the admitted knowledge possessed by the plaintiffs was knowledge that the defendants had directly damaged plaintiffs as a part of a program to violate the federal antitrust laws. Likewise, there was no denial by the plaintiffs of knowledge of the facts which constituted their alleged cause of action for violation of the antitrust laws, but only a denial of knowledge of a so-called "general conspiracy" of wider proportions.

An asserted affirmative defense based upon alleged knowledge sufficient to defeat the tolling of the statute of limitations by fraudulent concealment must be knowledge of the essential elements of a cause of action under the federal antitrust laws. Likewise, the knowledge must be with respect to violations of the antitrust laws which caused damages to the plaintiffs.

The Court of Appeals found, on the basis of the record, that the three activities which severely injured the respondents, plaintiffs below, were:

1. The activities of the petitioners, *acting in concert*, involving the Post Office Department and Securities and Exchange Commission which ultimately led to the indictment of the respondents, their employees, and officers. (Said indictments subsequently were dismissed by a federal court.)

2. The activities of the petitioners, *acting in concert*, to cause the Florida Securities Commission, in two succes-

sive years, to deny to the respondents' licenses to do business. (Each case was ultimately won by the respondents in the Supreme Court of the State of Florida.)

3. The activities of Walter P. Fuller, acting with and in behalf of the other defendants.

To constitute a violation of the federal antitrust laws, the action of petitioners acting in concert - in furtherance of a conspiracy - to the injury and damage of respondents was essential to their cause of action under the federal antitrust laws. Alleged knowledge of mere vigorous competition, and even unethical competition, by various individuals or corporations, was not knowledge of a cause of action under the antitrust laws. Certainly, from the proof in the record, a jury could find that respondents had no knowledge of their cause of action under the antitrust laws, until they discovered, after years of diligent investigation, that petitioners who were their strongest competitors had actually brought about respondents' downfall through *concerted action.*

In the last paragraph in support of reason III, petitioners attempt to make a vague distinction predicated upon a "single but concealed continuing conspiracy", based upon the allegations of the original complaint. The single continuing conspiracy theory was rejected by the Court of Appeals in the 1955 decision in this case (223 F. 2d 238), and became a part of the law of the case. In that earlier decision the petitioners themselves argued against the theory of a single conspiracy and their argument was sustained by the Court of Appeals.[16] They cannot now attempt to

[16] See footnote 13, page 25 of this Brief.

change the law in support of their Reason III, as they have attempted to do in support of their Reasons I and II.

In order to demonstrate how completely the petitioners have misconstrued and misapplied the decision of the Court of Appeals on the question of fraudulent concealment, we quote from the decision as follows (255 F. 2d 425, 432, 433):

> "We think it cannot be said as a matter of law that appellants had knowledge of the existence of the cause of action here sued upon for more than three years prior to the date of suit. This is a fact question and on the record before us should have been left to the jury.
>
> "It is next contended by appellees that even though there was a lack of knowledge the proof of fraudulent concealment was lacking. As pointed out by appellees, the Court has said:
>
> > 'Mere ignorance of one's rights will not toll the statute of limitations. Concealment by defendant only by silence is not enough. He must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry.' Arkansas Natural Gas Co. v. Sartor, 5 Cir., 78 F. 2d 924, 929, reaffirmed in Hickok Producing & Development Co. v. Texas Co., 5 Cir., 128 F. 2d 183.
>
> "The appellants answer that the very nature of the conspiracy charged, i.e., the fraudulent use by the appellees of the governmental bodies whose investigations are by law largely kept secret necessarily resulted in the degree of concealment which, if successful, would toll the running of the statute. This we have already held. When the case was last here we said:

> 'We think it quite clear that plaintiffs' amended complaint does well state their claim that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it.' 223 F. 2d 238, 248.

"Since, on the issue before the trial court, it assumed the existence of the conspiracy as alleged, see, 255 F. 2d 427, supra, we must treat the case as if these quoted allegations 'that the appellees did secretly move under the guise and protection of the public interest and through the public authorities' were proved.

"As we have previously stated, this case comes here on the assumption that the conspiracy was proved as charged. We do not imply, as we cannot, what the ultimate finding will be on this issue; nor do we say that as a matter of law appellants have shown such lack of knowledge. We think *they have shown sufficient facts* which, when coupled with the assumptions that we must make on the record, entitled them to have a jury trial on the question of fraudulent concealment." (Emphasis supplied)

The "sufficient facts" referred to in that decision are recited in the opinion of the Court of Appeals in this case at length, 255 F. 2d, pages 428-431, which recitation is predicated upon the record and is not contested here. That portion of the decision of the Court of Appeals is reproduced for the convenience of the Court in Appendix F of this brief at pages a33-a39, incl.

CONCLUSION

The petition states no reason which would justify this Court in granting certiorari at this stage of the litigation. When viewed in the light of the decision of the Court of

Appeals, and in light of the limited separate trial which was held below, the Petition has failed to set forth any important question of law for decision. The questions tendered are academic on this record, in addition to the fact that they were not procedurally brought forward. The claimed conflict with the decision of the 9th Circuit does not exist.

Respondents reiterate that the issue is simply one of fact, based upon the entire record of approximately four thousand printed pages, which question can be resolved only by a jury—as the Court of Appeals has twice held in this case.

Respondents respectfully submit that the case should now be permitted to go forward in a trial on the merits rather than arrested by a Supreme Court review of academic questions which are not ripe for decision.

The petition for writ of certiorari should be denied and Respondents so pray.

Respectfully submitted,

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APPENDIX A

Excerpts from the decision of the United States Court of Appeals for the Fifth Circuit, 223 F. 2d 238, entered May 10, 1955, pertaining to the issue of fraudulent concealment.

"We shall, therefore, proceed by setting down the conclusions we have reached, supporting each with a brief and concise statement of our reasons therefor and citing such cases only as we regard as controlling.

"Speaking generally, these conclusions are that, for the reasons hereafter briefly stated: (1) we find ourselves in agreement with the order of September 8, 1953, dimissing the complaint, as to Gall and Cummer Sons, and the counter-claim of defendants, Pierce and Pierce Corporation, for failure to state a claim; (2) we find ourselves in general agreement also with the pronouncements of law, the reasons given, and the authorities cited in support of them, in the January 14th opinion of the district judge, note 2, supra; (3) because, however, we are of the clear opinion that the amended complaint stated facts sufficient, if proven, to toll the statute of limitations, as to at least some of the wrongs claimed, we find ourselves in disagreement with the March 5th memorandum decision on the sufficiency of the amended complaint and with the March 5th order dismissing it, and that order will be reversed and the cause remanded with directions to accord plaintiff a trial on the issue of fraudulent concealment and for further and not inconsistent proceedings." (223 F. 2d at page 244)

"We come, then, to the final question in the case, whether the district judge erred in holding that the allegations of the amended complaint were insufficient to make an issue of fact upon whether there was fraudulent concealment tolling the statute.

THE SUFFICIENCY OF THE ALLEGATIONS IN THE AMENDED COMPLAINT, THAT THE CAUSE OF ACTION HAD BEEN FRAUDULENTLY CONCEALED TO AT LEAST MAKE AN ISSUE FOR THE JURY.

"This brings us at last to the final point in the case, whether the district judge was right in dismissing the amended complaint for failure to sufficiently allege fraudulent concealment. Without setting out the allegations, because of their great length, we think it quite clear that plaintiffs' amended complaint does well state their claim, that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it, and that the defendants' effort to meet this pleading by invoking judicial notice of matters which they call to our attention in their briefs, will not at all do. It may well be that the facts are better pleaded than they can or will be proved. The matters to which appellees seek to call our attention may prove the Achilles heel in, and the death wound to, plaintiffs' case before the jury, but these are not matters which arose on the face of their pleading or in any other proper way below, and we may not consider them in passing on the ruling under review. Their claim of blissful ignorance may suffer also before the jury from their admissions in their pleadings that Ball's antipathy, indeed enmity, to them, was of long standing and had been long known to them, as it may with the jury open a breach in their defense of fraudulent concealment, but these and all other such matters are and must remain for the arbitrament of the jury and may not be adjudicated by the court." (223 F. 2d, at pages 248, 249)

APPENDIX B

Order denying Motion for Summary Judgment.

On December 13, 1956, the Court entered ORDER DENYING DEFENDANTS' MOTION for SUMMARY JUDGMENT and adjudging that it is unnecessary for Plaintiffs to respond to said Motion, as follows:

"On this 13th day of December, 1956, the defendants filed "Defendants' Motion for Summary Judgment" and made personal service upon counsel for the plaintiffs.

"During the course of a hearing upon two motions filed by the plaintiffs herein, beginning at 2:00 P. M. o'clock on this day, the "Defendants' Motion for Summary Judgment" was referred to by counsel.

"Being of the view that the opinion of the United States Court of Appeals for the Fifth Circuit, dated May 10, 1955, constitutes a direction to this Court to give the plaintiffs an opportunity to present their evidence on the issue of fraudulent concealment to a jury.

"It is hereby Ordered and Adjudged:

(1) That said Motion for Summary Judgment is hereby denied, without argument and without any consideration of its content.

(2) That it is unnecessary for the plaintiffs to respond to Defendants' Motion for Summary Judgment.

"Done and Ordered at Tallahassee, Florida, this 13th day of December, 1956.

(S.) DOZIER A. DeVANE,
United States District Judge."

APPENDIX C

Section 7 of the Sherman Act (26 Stat. 210).

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

APPENDIX D

The pretrial order of the District Court limiting the issues to be tried before the jury.

On the 25th day of September, 1956, the Court entered a PRE-TRIAL ORDER in the following words and figures to-wit:

"Upon the trial of the single issue of fraudulent concealment in the above-styled cause, it will not be necessary for the plaintiffs to prove:

1. That a conspiracy to violate the Federal Antitrust Laws existed among the defendants as alleged in the First Amended Complaint.

2. That damages were sustained by the plaintiffs as the result of the conspiracy.

"Done and Ordered at Tallahassee, Florida, this 25th day of September, 1956.

(S.) DOZIER A. DeVANE,
District Judge."

APPENDIX E

Portions of respondents' proof of fraudulent concealment.

a. *The Main-Wheeler Complaint*

In 1941, the defendant Roger L. Main was an important duPont executive (R. 937). As a former FBI man (R. 2828), however, he performed investigatory services for the defendant Edward Ball and for the duPont enterprises (R. 2868). He testified that he knew nothing about municipal bonds (R. 2841) since responsibility in this field was retained by Ball (R. 2830). Prior to the spring of 1941 his acquaintance with the defendant Howard Wheeler was casual (R. 2831).

The defendant Howard Wheeler testified that he knew Main had no familiarity with bond matters, but that he approached him for help because of Main's acquaintance with government procedures, fraud cases (R. 924), and for his Washington "contacts" (R. 925).

Main and Wheeler had several visits concerning the project in the spring of 1941 (R. 946; 2832). Wheeler prepared an undated, unsigned anonymous memorandum (R. 894, 915; Plaintiffs Ex. #1; R. 3125-3132). To assemble the exhibits, he called upon the services of his associate the defendant Paul L. Pierce (R. 890; 891; 895; 1053) a 10% owner in Leedy, Wheeler & Co. (R. 1053). The memorandum was a charge against plaintiff R. E. Crummer & Company of irregularities in municipal bonds in Lee County, Florida (Plaintiffs Ex. #1, R. 3125-3132).

As to the lodging of the complaint at Washington on May 21, 1941, Main testified that it was purely an act of friendship to Wheeler (R. 2842). In the discussion at the Post Office Department in Washington, Wheeler took the lead (R. 2841). Main testified that he was in Washington on May 21 on other business and had notified Wheeler that he would accompany Wheeler to the Post Office Department if Wheeler could come to Washington at that time.

The episode was merely "an incident of the trip" (R. 917). Main contended he was merely accommodating Wheeler (R. 2838). Both Main and Wheeler testified that they told no one about the trip except that Wheeler told his partner the late L. C. Leedy (R. 914; 2842; 2883). Although Main supposedly had the "contacts", it was L. C. Leedy who arranged the appointment with the Post Office Department for Main and Wheeler through Senator Claude Pepper's office (R. 2873). And although Main knew the government procedures, Wheeler swore that he made the decision to file the case at Washington (R. 872) bypassing the Atlanta, Jacksonville and Orlando offices (R. 871; 873). At Washington, when Wheeler went to Senator Pepper's office, Main remained outside (R. 902).

Although Leedy made the Washington appointment and Wheeler did the talking, with Main understanding little (R. 2841), Main soon received a letter from the Post Office Department to the effect that he would have to make a "formal transmission" of the anonymous memorandum (R. 2843). Evidently an anonymous document was not acceptable. This caused Main to write such a letter (R. 2843) to which he attached an additional memorandum prepared for him by Wheeler (R. 2843). He used his personal stationery saying there was no Company angle to it (R. 2844).

But the letter which is dated May 30, 1941 and the memorandum (Plaintiffs Ex. #5; R. 3137-3139) do not comport with the claimed secondary and casual role of Main. In the letter, Main recommended that the Post Office Department "shortly initiate an investigation"; he discouraged the Post Office Department from centering the investigation at Chicago, and advised that "more information can be obtained" in the Florida district. The letter invited the Department to call on Main "for any assistance" that he might render and it advised the Department that Main hoped "to have some additional information to forward to you shortly" (R. 3138). This latter promise was

fulfilled by a letter from the Lewis State Bank of Tallahassee, the oldest banking institution in Florida, without its knowledge or consent. It was accomplished in such a way as to cause the Post Office Department to believe that the Lewis State Bank was one of the accusers against the plaintiffs in support of the Main-Wheeler charge.

b. *The Lewis State Bank Letter*

Main testified that he had no further contact with the Post Office Department after the formal transmission (R. 2845). On May 27, 1941, however, there was written a letter by the Lewis State Bank at Tallahassee to the County Commissioners of Lee County, Florida (Plaintiffs Ex. 13; R. 3180). The letter was somehow received by the Post Office Department for its Crummer file and stamped with the notation "left in person by the complainant 6-13-41". The Post Office Department division slip which identifies the case clearly shows "Complainant: Roger L. Main, Jacksonville, Fla." (Defendants Ex. 18; R 3396). Wheeler testified that the letter and notation meant nothing to him since he knew nothing about either (R. 897). It should be noted at this point that after the two criminal indictments were returned against plaintiffs, Post Office Inspector E. J. Mansfield rendered his official summary to the Department which is entitled "Reporting Indictments". This report (Plaintiffs Ex. 12; R. 3178; 1058) recited that the "Basis of Case" was the "Complaint of Roger L. Main . . ." concerning ". . . misrepresentation and fraud" in Lee County bonds, and that complainant had made a personal visit to the Department in Washington on May 21, 1941. Continuing, the report stated that "A similar complaint was made at the office of the Inspector-in-Charge, Atlanta, Georgia on June 13, 1941 by P. B. McDougall, Cashier of the Lewis State Bank at Tallahassee, Florida, who submitted a copy of the complaint written by him on May 27, 1941, to D. T. Farabee, Clerk of the Board of County Commissioners of Lee County, Florida" (R. 1058).

Three officials of the Lewis State Bank testified, however, that they knew nothing about it. These were Mr. G. E. Lewis, its President (R. 1059), Mr. George L. Henderson, its Vice-President (R. 1059), and the same Mr. P. B. McDougall, its Cashier. All of them testified that they and the Lewis State Bank at no time filed any complaint against plaintiffs (R. 1061; 1062; 1067; 1068; 1069; 1072). They recalled that in 1941 their file on Lee County bonds had been turned over to the defendant Paul L. Pierce (R. 1061; 1073). No one could account how the letter reached the Post Office Department (R. 1068). In 1947, the Bank had wired the McCarran Committee that Wheeler was not acting as their agent or with their knowledge or consent in making complaint in Washington on May 21, 1941, that they did not know how the letter reached the Post Office Department (R. 1065).

The letter itself (Plaintiffs Ex. #13; R. 3180) tends to confirm the testimony of these bank officials because it nowhere mentions either the Crummer companies or the Post Office Department, or the subject of fraud. It is simply a demand for 5½% interest on $5,000 par value of Lee County bonds because they allegedly were not legally called on January 1, 1941.

The defendant Paul L. Pierce, who had assembled the Lee County materials for Wheeler, admitted that he had received the Lewis State Bank files in early 1941 but was careful to deny that he ever received that particular letter of May 27, 1941. Thus, with Main, Wheeler and Paul L. Pierce (R. 903; 2845) all denying the use of the Lewis State Bank letter to bolster the Post Office Department complaint, or to cause it to appear that the bank was a complainant as the official report to the Post Office Department shows, the trail may seem a little obscure as to just how the letter got to the Post Office Department and who left it there. But plaintiffs are aided at this point by weighty circumstantial evidence which overcomes reasonable doubt.

The circumstances are these: Main, Wheeler, L. C. Leedy, and possibly Paul L. Pierce were the only persons who admittedly knew of the lodging of the Lee County complaint. Main and Wheeler both testified that the Post Office Department representative at Washington had difficulty in understanding just wherein the alleged fraud lay (R. 869; 979). Therefore, the supplemental memorandum to Main's letter to the Post Office Department of May 30, 1941 seemed a necessity. Now then, a comparison of the supplemental memorandum (prepared by Wheeler and transmitted by Main) with the Lewis State Bank letter of May 27, 1941 (Plaintiffs Ex. #5; R. 3138 and Plaintiffs Ex. #13, R. 3180) shows that the two documents express the same thoughts in similar language. They both explain the law and methods of a proper call of bonds and tend to clarify what the Post Office Department representative did not seem to understand. The letter was written during the same week of history as the Main-Wheeler complaint and supplemental memorandum and ended up in the same Post Office Department file at about the same time. It strains credulity to believe that the defendants Main, Wheeler and Paul L. Pierce did not engineer the Lewis State Bank letter in aid of the charges which they filed. In note [a] below we have set up a visual illustration of the thought and language similarities between these two documents.

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a (In the two excerpts below, we have inserted numbers in parenthesis into the text of the documents, to identify six (6) underscored ideas in each document. By comparing the corresponding numbers in the two documents, the similarity of ideas can be detected.)

EXCERPT FROM THE WHEELER SUPPLEMENTAL MEMORANDUM:

(1) **In the case of Lee County, Florida, the right to redeem the bonds before maturity was retained by the County** and the privilege for such redemption provided they could be called for payment (2) **on any interest payment date** on or after January 1, 1940; that (3) **notice of redemption be published** (5) **not less than thirty days prior** to date of redemption and that certified copy

c. *The "Lee County, Special" Account*

By 1941, Clyde C. Pierce Corporation and Leedy, Wheeler & Co. were quite active in various joint enterprises in the purchase and sale of bonds (R. 2676; 1531). Plaintiffs established that upon returning from Washington, the defendant Wheeler went to the office of Clyde C. Pierce Corporation in Jacksonville on May 23, 1941, where he dictated a letter for the joint signature of the two corporations pertaining to some of their joint business (R. 884; 916; 2686; 2706).

During the same week, a meeting was held between representatives of the two companies pertaining to the formation of a syndicate to buy bonds of another taxing unit (R. 1529).

On May 27, 1941, Leedy, Wheeler & Co. sent a bill to Clyde C. Pierce Corporation which it entitled "Lee County,

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of the notice of redemption be filed with the bank of payment, in this case being the City Bank Farmers Trust Company, New York City.

No such notice, either by publication or filing with the New York bank of payment was given in the case of Lee County, except on the $80,000 bonds. The privilege of redemption was (6) **not legally exercised by** (4) **proper** notice on any other bonds of the County.

EXCERPT FROM THE LEWIS STATE BANK LETTER:

(1) **These bonds were callable** (2) **on any interest date** at par and accrued interest, upon (4) **proper** (3) **published notice** (5) **more than thirty days prior** to the date upon which they were called for payment. We forwarded for collection for the account or our client the coupons from the above described bonds due January 1, 1941, and they were returned to us with notation "present with bonds for redemption." Upon receiving this notice the coupons and bonds were surrendered and paid.

We subsequently learned these bonds (6) **were not legally called,** therefore we insist on behalf of our client that you return the bonds, or in lieu thereof pay interest to us for our client at the rate of 5½% per annum from January 1, 1941 until such date as these bonds are legally called for payment.

Special" (Plaintiffs Ex. 3; R. 3134). The bill is simply for $38.65 telephone and $289.10 travel expense. One-half was paid by Clyde C. Pierce Corporation. Plaintiffs exhibited great interest in this bill because it appeared that at that time there were no Lee County transactions afoot between these two companies. Clyde C. Pierce, of the Jacksonville Corporation, testified that his company had nothing to do with Lee County bonds until June 6, 1941 when Lee County advertised its bonds for sale (R. 1515; 1518). And he had sworn in February 1946, before Main and Wheeler were discovered, that he and his company had no connection with the Post Office investigation (R. 1505).

Although Clyde C. Pierce and Wheeler both swore that Pierce did not know about or have anything to do with the lodging of the Lee County complaint on May 21, 1941, plaintiffs made substantial showing to the contrary. In the first place, plaintiffs proved that when Clyde C. Pierce Corporation and Leedy, Wheeler & Co. were the successful bidders for the Lee County bonds in the month of June 1941, they had with them a third member of the syndicate, The Equitable Securities Corporation. Their syndicate settlement sheet, dated July 18, 1941, was introduced as Plaintiffs' Ex. #4 (R. 3135-3137). This document excludes the hypothesis that the statement with the cryptic title "Lee County, Special" was a part of normal syndicate dealings, but establishes a necessary inference that the Pierce defendants directly participated in the Main-Wheeler Complaint.

On October 30, 1956, two months before the trial started (R. 854), the witness Wheeler was confronted with this document with the explanation that it was part of the documents produced by Clyde C. Pierce Corporation during the taking of deposition (R. 874). Sharp examination was directed to obtaining a confession that the bill was for the Washington trip (R. 874-879). The witness did not know what the statement could have possibly been for at

that period (R. 877). At that deposition, the witness would only concede that it would be a "possibility" that the bill was connected with the filing of the Post Office charge (R. 878).

At the trial of the case, the defendant Clyde C. Pierce testified that he did not know what the bill meant (R. 2680); that the payment of bills is purely routine in the office (R. 2680); that bills that come into the office were simply directed to the bookkeeper and automatically paid (R. 2711); and that he was confident that it was never called to his attention that that was part of the expenses of Wheeler's trip to Washington (R. 2681).

Thus up to that point of the trial, plaintiffs had showed that the "Lee County, Special" bill was transmitted and paid at the time of the lodging of the complaint; that there were no other Lee County dealings between the parties at that time; that such dealings as there were occurred later and with a third member in the syndicate. The question was pointedly brought to the attention of the defendants as a challenge two months before the trial. Nevertheless, although Clyde C. Pierce Corporation and Clyde C. Pierce, individually, are represented by the same able counsel, and although Howard Wheeler and Leedy, Wheeler & Co. were likewise represented by the same able counsel, at the trial of the case neither corporation and no defendant brought forward any of their books, records, or correspondence to explain in any way that the "Lee County, Special" bill was innocent, or even that their records were unavailable or lost.

d. *The February, 1946 Testimony*

In February, 1946, (before Main and Wheeler were discovered) the defendant Walter P. Fuller testified on oath that he did not know how the federal investigation was brought about or started (R. 1785). As to how he learned about it and came to play such a part in it, he stated that

he had learned about the investigation because people had remarked to him that the Post Office Inspectors had been around asking questions (R. 1785). He caused it to appear that he learned about it from various bond dealers upon whom the Post Office Department had called for information (R. 1792).

But in his deposition in this case, he retracted the statement that he had learned about it from bond dealers in the way he had previously testified (R. 1969). In his deposition, he disclosed that he learned of the origins of the federal investigation from one Henry Sinclair, who was very close to L. C. Leedy (R. 1958). After vacillating and avoiding outright confession (R. 1959; 1961; 1966; 1968; 1974; 1975) he finally admitted that he knew that the Post Office investigation that he was assisting had been initiated as to Lee County by the defendant Howard Wheeler (R. 1975). Fuller tried to deny his knowledge so many times that the court overlooked his eventual admission causing a considerable disagreement and colloquy between court and counsel (R. 2087-2088). But a second review of the record established that he did make the confession (R. 2224-2225) although much effort was required to get it out of him (R. 2224-2227).

As will be seen, Fuller's testimony follows the same pattern as that of E. J. Mansfield, Clyde C. Pierce, and Paul L. Pierce. They all knew the origins of the federal investigation and concealed it under oath. If any of them had truthfully stated what they knew, the trail would have led to the defendants much sooner.

For the defendant, Clyde C. Pierce testified in February 1946, that he and his firm did not appear anywhere in the federal investigation except that they were visited once by an Inspector of the Post Office Department, which information was very little (R. 1505).

And the February 1946 testimony of the defendant Paul L. Pierce was likewise artful. When asked whether Leedy,

Wheeler & Co. had ever filed a complaint or protest against the issuance of a license for The Crummer Company, he answered: "So far as I know we have never filed any complaint against Crummer company" (R. 1054). He added: "I don't think that you could assume an honest, open-minded competitor would file complaints against another competitor", and that it would not be his nature to file complaints (R. 1054). He further added that he would have declined to appear against the Crummer companies as he had no knowledge of any wrongdoing on the part of the Crummer companies and that he, Pierce, "wouldn't think it ethical to stop a competitor from being licensed to do business" (R. 1055).[b]

And E. J. Mansfield, the Postal Inspector who procured the two Kansas indictments along with the Securities and Exchange Commission, testified in this case that he never disclosed the identity of the complainant until after December 27, 1946 (R. 1305). When called to testify before the McCarran Committeee in February 1946, he first asked to be relieved of testifying on grounds of public policy (R. 1274).

Although he was the author of Plaintiffs Exhibit #12 (R. 3178), the document entitled "Reporting Indictments" and although from his extensive investigation he knew the origins of the case which he prosecuted, he testified to the McCarran Committee that it did not become apparent to him at all during his investigation that any of the competitors of the Crummer people were behind the investigation (R. 1398). He swore that he had no knowledge that Mr. Ball was somewhere in the initiation of the investigation (R. 1290). He swore that his files indicated that the initia-

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b This February, 1946, testimony by Pierce should be read together with Plaintiffs' evidence of lulling activities between 1941 and January 1947, in terms of warm personal friendship and pleasant business dealings existing between members of the Crummer organization and members of the Leedy, Wheeler & Co., and of Clyde C. Pierce Corporation (R. 2699; 862; 888; 2579; 2580; 2583).

tion of the complaint came from many persons who had gone to Washington and Atlanta to complain about the Crummer companies (R. 1282). But in his deposition in this case, he explained that the latter answer was due to faulty recollection (R. 1300).

In this February 1946 testimony Mansfield assured that he was guided by no person in carrying out his investigation (R. 1280) and that persons whom he contacted in Jacksonville merely answered specific questions, volunteering very little if anything (R. 1284).[c]

Another witness at the McCarran Committee hearing was Giles Patterson, an attorney for the duPont interests in municipal bond matters. As to the SEC investigation, Patterson testified that he had one request from an SEC investigator for information and this he refuesd to comply with (R. 1799). He further testified that his only connection with the Post Office investigation was that he was visited three or four times by E. J. Mansfield and was occasionally called on the phone by Mansfield to ask

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c In February 1946 Inspector Mansfield gave extensive, detailed testimony outlining how he proceeded in his investigation. It was an impressive display of independent government action uninfluenced by private parties. He detailed his independent legal research (R. 1277). He obtained his bondholder lists from the SEC (R. 1279). A reading of the judicial decisions led him to various attorneys (R. 1280). He was guided by no person or agency other than when he requested information on specific matters of his own initiative (R. 1281). He pretended at one point that the only advice he sought in Jacksonville was from Walter P. Fuller whom he described as an investigator from the government of Florida (R. 1281). Jacksonville sources which he interviewed gave him information only in response to specific questions, and volunteered little if anything (R. 1284). Competitors had nothing to do with his investigations (R. 1286). He did his own legal research independently (R. 1287). He questioned Giles Patterson concerning the Bay County case because he was led to Patterson by information from the SEC (R. 1289). His approach to various attorneys was on his own initiative and in accordance with the practices of the Post Office Department (R. 1281). But later disclosures showed otherwise.

questions (R. 1803). Patterson denied that he ever gave Mansfield any legal materials (R. 1803). Mansfield's version of the same affair was that Patterson merely answered specific questions which Mansfield might have put to him (R. 1284).

Patterson also testified he had nothing at all to do with the State Bond Investigating Committee (R. 1803). He testified that he did examine the report of the Committee at the informal request of the Governor of Florida and advised the Governor that he did not think there was any evidence in that report to warrant any prosecution, that the counties benefited from the Crummer refundings and that he knew nothing about any dealings with the bondholders (R. 1803; 1804; 1805).

Fuller testified that Patterson refused to take any part in any activity or to furnish any evidence against the Crummer interests (R. 1793). He professed to have no knowledge that Patterson had studied Fuller's report for the Governor (R. 1793).

But on deposition in this case, Fuller admitted that he did know to the contrary "in exact detail" (R. 1964). He acknowledged that he and Patterson gave similar testimony in February 1946, and both of them were wrong (R. 1965). Recanting his own testimony, Fuller testified by deposition in this case "I now state . . ." that Patterson was a consultant to Fuller's committee ". . . in its legislative program . . ." and that Patterson ". . . of his own volition, was author of the idea that a broad suit for accounting of profits against the Crummer organization . . ." would be profitable to the taxpayers (R. 1965). On this subject, plaintiffs introduced a letter by Patterson to the Governor, dated January 9, 1943 (Plaintiffs' Ex. #50; R. 3334-3338). Plaintiffs further produced a letter from Mansfield to the Post Office Department written 11 days after the Patterson letter in which there occur further language and thought similarities which entitle plaintiffs

to infer that Mansfield had the Patterson letter before him when he outlined a proposed investigation to the Post Office Department (Plaintiffs' Ex. #52; R. 3340-3343). We have extracted a few words from each letter for a visual comparison. (See note [d] below.) These letters and Fuller's recantation do not comport with the testimony given in February 1946, but they do support the allegations of the first amended complaint that Mansfield and others misled plaintiffs by testifying that his "contacts with the Ball-duPont and Leedy-Pierce defendants were minimal, always originated by him, limited to a few specific questions by him, and without volunteering on the part of any said defendants" (R. 87).

As to Fuller's claim that his erroneous testimony in February 1946 was due to his forgetfulness (R. 1965), plaintiffs are entitled to infer otherwise, because of letters

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d (We have extracted the three most similar sentences from two letters):

LETTER FROM PATTERSON TO GOVERNOR—JAN. 9, 1943

(1) "To unravel the multitudinous transactions of the agent would require having access to its books and records, and probably an audit of same" (R. 3336).

(2) "Since the County debt has not been increased, the agent profited largely at the expense of the bond holders" (R. 3336).

(3) "Such litigation must be carefully prepared in order to have reasonable assurance of success." (R. 3336).

LETTER FROM MANSFIELD TO P. O. DEPARTMENT—JAN. 20, 1943

(1) ". . . the details of Crummer's profits and the manner in which he perpetrated frauds on vast numbers of bondholders can only be fully disclosed from Crummer's own records by accountants." (R. 3342).

(2) "It is believed that these [bondholders] are the people who have been chiefly defrauded by Crummer". (R. 3343).

(3) "It is my opinion that if the investigation is carefully followed up adequate evidence of fraud . . . can be established." (R. 3343).

produced under subpoena in this litigation by Fuller (R. 1952). In one letter Fuller related that he outlined to Mansfield, during an interview, the Patterson idea of an accounting suit and how Mansfield readily agreed that he believed such a suit sound (R. 1953; Plaintiffs Ex. #29; R. 3245-3247). In another letter, Fuller wrote Archie Clement, Chairman of the State Bond Investigating Committee, that: "A matter has been pending for some time which I am now pleased to report on". He recited that the Securities and Exchange Commission and the Post Office Department are working together and that they "join in the suggestion that the three groups cooperate in the investigation". Continuing, Fuller said: "At the moment our work is on Citrus and Okeechobee counties and both Mr. Patterson and I have considerable data on these counties that Mr. Mansfield and the SEC men want." (Plaintiffs Ex. #30; R. 3247-3248). In the face of this correspondence, plaintiffs are entitled to infer and submit to the jury that Fuller knew better when he testified Patterson completely out of the picture insofar as any anti-Crummer activities are concerned. This same defendant is the one who also avoided disclosure of the fact (which he knew in 1946) of the Wheeler and Leedy origins of the Post Office complaint. When the 1946 testimony of Clyde C. Pierce, Paul L. Pierce, Giles J. Patterson, and E. J. Mansfield are all compared, plaintiffs are entitled to infer that, as a group, the defendants employed the same stratagem, namely, to cause it to appear that the federal investigation was in no way related to private parties and that Fuller's activities were unrelated to private parties and were merely a wholesome Federal-State cooperation in which the private defendants or their agents had no part.

c. *Hearings of January 6, 7 and 10, 1947*

The first disclosure of Main's name on December 27, 1946 had occurred at Jacksonville (R. 2073, 2076; Plaintiffs' Ex. 7, R. 965-966, 3141). Evidently not knowing what it had

found, the McCarran Committee repaired to Washington (R. 2073, 980). But in a few days it issued subpoenas for Main and Wheeler and a third subpoena for Ball.

These three met on January 10, 1947, at the Carlton Hotel, Washington D. C., where they discussed the impending interrogation (R. 929-932) of Main and Wheeler, Ball having testified on January 6 and 7.

On January 6 and 7, 1947, Ball testified: That he had no knowledge of the Main complaint to the Post Office Department at the time it happened (R. 1469); that he did not know there was a federal investigation until 1944 (R. 1473); that he had nothing to do with instituting the federal investigation (R. 1479); that he was visited twice by Mansfield, once in the company of the SEC representatives (R. 1478), and then he merely answered questions (R. 1479); that he never tried to eliminate Crummer from Florida (R. 1480), and never took action in that direction (R. 1480); that his acquaintance with Fuller was casual (R. 1485); that he had nothing to do with House Resolution 46 ("As far as I know . . .") (R. 1486); that he never received advices about the activities of the State Bond Investigating Committee from Fuller (R. 1487), from Patterson (R. 1488), or from any other source (R. 1488) except what might have appeared in the press (R. 1488); and had absolutely nothing to do with it (R. 1489-1490).

We mention in passing that under Rule 33, FRCP, Ball had answered interrogatories under oath in this case, stating his first knowledge of Main's letter to the Post Office came to Ball "after December 27, 1946, when the subcommittee of the Committee on the Judiciary conducted hearings in Jacksonville, Florida." (R. 1460).

Main (R. 970, 980) and Wheeler (R. 923-932) testifying on January 10, 1947 gave their version, summarized at pages a6 to a8 of this Appendix, to the effect that the

Post Office complaint was the act of Wheeler and that Main's presence in the picture was purely for friendship and accommodation.

Plaintiff's theory as to the reason for the pretense that the episode was the sole responsibility of Wheeler, when Main was the formal complainant, is consistent with the known facts and with the rest of the case. For on January 6 and 7, 1947, Ball's emphatic disclaimer of this predatory attack on the Crummer companies had been pierced in one important respect. After making these emphatic statements, Ball had been confronted with his January 14, 1943 letter to the Florida Securities Commission, the authorship of which he had to admit (R. 1482). If Main now (in 1947) appeared as the moving party in another effort against the Crummer companies, the conduct of these two duPont executives would not look good to the McCarran Committee. Thus Wheeler, who wrote the anonymous document and had never signed his name to a complaint, was presented as the sole responsible party.

Ball's testimony that he knew nothing of the State Bond Investigating Committee's work from either Fuller, Patterson, or anyone else may properly be compared by plaintiffs with his later discovered letter of November 16, 1942 (Plaintiffs' Ex. #38, R. 3275) and to the Fuller and Patterson letters discussed at pages a17-a19 of this Appendix.

The November 16, 1942, letter by Ball was written to the late J. M. Lee, a member of the Florida Securities Commission, and requested the cancellation of the license of R. E. Crummer & Company. After advancing the so-called Bay County Decision as grounds for this cancellation, Ball advised Lee that other Crummer refundings "have been checked by the Special Legislative Committee, and I understand that there is a lot of other evidence indicating, at least in my opinion, that he and his associates are unfit to be licensed" (R. 2136; 3275-3276). At the time of this letter, November 16, 1942, the Fuller investigation was

completely secret and unreported to the public or to the Florida Legislature (R. 1971; 2202; 2163). Thus, Ball's total disclaimer of knowledge or use of the Fuller Committee has been proved erroneous because Ball was privy to Fuller's investigation when plaintiffs and the public were not, and Fuller during this period in 1942 was in close communication with both Patterson and E. J. Mansfield in his efforts to move the federal investigation forward. (Plaintiffs' Ex #29; R. 3145-3147; Ex. #30; R. 3247-3248).

Plaintiffs offered evidence that three efforts were required before Ball could be served with subpoena (R. 1492-1499) In February 1946, he was away fishing (R. 1498) and in December 1946, he stated he was too ill to accept service from the U. S. Marshal (R. 1498) although the next day he made a business appointment (R. 1499). Ball did not take the stand in this case and the conflicts between his January 1947 sworn testimony and the later discovered letters and activities are totally unexplained.

f. *The Florida Securities Commission Episode*

Plaintiff, The Crummer Company, submitted its first application for a Florida permit to do a securities business at the beginning of 1943. On January 20, 1943, the Florida Securities Commission wired The Crummer Company requesting the citation of a certain decision known in this record as the Bay County case (R. 2106). The wire was answered the same day (R. 2107).

Following this, in January 1943, W. J. Meredith, then President of plaintiff The Crummer Company, received information that Edward Ball had written to the Florida Securities Commission concerning the Crummer license and rumor that during the month of February Ball had appeared in person before the Commission (R. 2106). The letter is dated January 14, 1943, and a purported copy of it was identified by Ball on January 6, 1947 (R. 1482).

The appearance of Ball before the Commission, however, was in a secret meeting (R. 2619; 2701; 2139) and there followed a sequence of events by which both Ball's participation and his effective inducement of this license refusal were fraudulently concealed. For when The Crummer Company made the charge that Ball had influenced the Commission in this matter, the conspiratorial program went underground by means of official minutes which placed Commission action upon other and entirely different grounds. Furthermore, the license denial itself, as well as certain related quo warranto proceedings against The Crummer Company, were based upon later events which took place on April 20, 1943 (R. 3272) thereby causing it to appear conclusively that the events of January and February, 1943, could have had no connection with this later cause for license denial. And when The Crummer Company sent its attorney to investigate it was confronted with a stone wall of official documentation and denial which effectively misled the plaintiffs. The events unfolded in this way:

On February 13, 1943, the Commission issued a press release that the Crummer license would not be issued pending a check of the financial structure of the new Company and the assets, liabilities, and dealings of R. E. Crummer & Company which was in process of being dissolved (R. 2111; Plaintiffs' Ex. #32, R. 3249-3250). On February 19, The Crummer Company wrote the Commission protesting the newspaper article and the delay. The letter stated that The Crummer Company has been advised that Edward Ball had advised the Commission that in Ball's opinion The Crummer Company license should be denied because of the Bay County decision. The letter makes a lengthy defense of the Bay County episode (Plaintiffs' Ex. #33; R. 3250-3258). Similar letters were sent out by The Crummer Company to various taxing units of Florida in the hope that their aid, support, and recommendations could be obtained in this matter (R. 2115).

On March 24, 1943, the Commission replied to The Crummer Company transmitting a copy of its official Minutes of March 24, with the seal of the Commission duly affixed (Plaintiffs' Ex. #34; R. 3259-3262). The official minutes make no reference to the Bay County case as a factor nor to Mr. Ball. To the contrary the minutes state that the license of The Crummer Company would be held up until R. E. Crummer & Company completed its unfulfilled contracts.

On May 1, 1943, R. E. Crummer & Company responded demanding to know what contracts were claimed to be unfulfilled (Plaintiffs' Ex. #35; R. 3262-3269). In this letter, Mr. Crummer stated: "It is my best judgment" that the Commission is acting in accordance with the expressed wishes and recommendations of those who should be properly classified as competitors or those on the public payroll "whose prejudices against R. E. Crummer & Company are well known" (R. 3266).

While the matter was thus pending, a municipality in Florida, the City of Inverness, obtained the passage of a special bill through the Florida Legislature authorizing the City of Inverness and The Crummer Company to enter into a refunding contract (R. 2124). Inverness had solicited a Crummer refunding and the contract was made conditional upon the issuance of a license to The Crummer Company or the procurement of a special act (R. 2125).

On June 26, 1943, the Commission advised The Crummer Company that its license had been denied (Plaintiffs' Ex. #36; R. 3270) and it enclosed and forwarded certified copies of two Resolutions of the Commission again duly certified over the seal of the Commission (R. 3272-3274). The official minutes show a denial of the license for the reason that The Crummer Company had entered into the City of Inverness contract and in so doing, had violated certain Florida statutes (R. 3272).

At or about the same time, the Attorney General of Florida brought a quo warranto proceeding against The Crummer Company (R. 2128). The Commission's Minutes of June 14, 1943, reflect that the quo warranto proceedings were based upon the same grounds as the license denial, namely, the City of Inverness contract (R. 1813). The legal theory of these two actions was that the Special Act which authorized the Inverness contract was not valid and thus The Crummer Company was doing business in Florida in defiance of duly constituted regulatory authority. *State ex rel Watson v. Crummer Co.*, 153 Fla. 640, 15 So. 2d 441 (1943); *State ex rel Crummer Co. v. Lee*, 153 Fla. 642, 15 So. 2d 442.

All these facts were laid before plaintiffs' attorney (R. 2130) who successfully resisted the quo warranto action and who brought the successful mandamus proceedings in the Florida Supreme Court to obtain the license. At such time, this attorney, Mr. D. C. Hull of the law firm of Hull, Landis and Whitehair of DeLand, advised plaintiffs that the official minutes disclose the true grounds for the denial and that the other matters above referred to "had no place in it". Nevertheless, plaintiffs caused their attorney, Senator Pat Whitaker of Tampa, to make a further investigation during which he personally interviewed the Attorney General of Florida and the Comptroller, two of the three members of the Florida Securities Commission (R. 1205). Attorney General Watson emphatically advised Whitaker that the cause of the denial was R. E. Crummer & Company's unfulfilled contract (R. 1205) and Edward Ball knew nothing about it, had not seen Watson, and had influenced the denial in no way (R. 1205). Following up, Whitaker also interviewed Comptroller Lee (R. 1218), and Lee likewise emphatically denied that Edward Ball or the duPont interest had seen or communicated with him in connection with this (R. 1219). Lee stated that in his view, he could see no reason to license The Crummer Company when R. E. Crummer & Company was still li-

censed (R. 1219). The statements of the two State officials were, of course, consistent with the official minutes served on the plaintiffs over the seal and certificate of the Commission. Confirmation of Whitaker's testimony is found in the fact that in February, 1946, the members of the Commission, this time all three, testified, under oath, consistently with the minutes and with their statements to Whitaker to the effect that the correct grounds of denial were stated in the minutes and were not influenced by any private personal complaint (R. 2131). This sworn testimony was reviewed by plaintiffs (R. 2131).

Accordingly, W. J. Meredith testified in the instant case that plaintiffs had no knowledge or information as of January 1, 1947, that any of the private defendants was behind the Commission in connection with the action that it actually took, that is, the denial of the license because of the City of Inverness Contract. At the time, the information from the Commission and its members was taken to be true by plaintiffs and by their attorney (R. 2133; 1231; 1242; 1253).

Since January of 1947, however, plaintiffs have made discovery of two letters. The first of these is a letter, dated November 16, 1942, from Edward Ball to J. M. Lee, requesting the cancellation of the R. E. Crummer & Company license (Plaintiffs' Ex. #38; R. 3275). The letter advances the Bay County decision as a ground for cancellation of the license of R. E. Crummer & Company. On that date, The Crummer Company had no application for a license pending (R. 2136). This letter by Ball never bore fruit and there was no occasion for plaintiffs to know that it existed. But the letter recites something quite significant: It states that in addition to the particular Bay County matter, other Crummer refundings "have been checked by Special Legislative Committee, and I understand that there is a lot of other evidence indicating at least, in my opinion, that he and his associates are unfit to be licensed" (R. 2136; Plaintiffs' Ex. #38; R. 3275-

3276). At the time of this letter, November 16, 1942, the Fuller investigation was completely secret and unreported to the public or to the legislature (R. 1971; 2202; 2163). Therefore, it appears that Ball was in some way privy to Fuller's activities when plaintiffs and the public were not. (Fuller was at this period in close communication with both Patterson and E. J. Mansfield in his efforts to move the federal investigation forward.) (See Plaintiffs' Ex. #29; R. 3245-3247; Ex. #30; R. 3247-3248).

A second letter discovered by plaintiffs is one dated May 29, 1943, from Edward Ball to J. Edwin Larson, Chairman of the Florida Securities Commission. This letter encloses a copy of the proposed Special Act validating the City of Inverness contract with The Crummer Company. (Plaintiffs' Ex. #39, R. 3276-3291). The letter infers that Ball did not know but Larson would know "whether a special act of this kind can invalidate a General Act * * * " It continues: "Am I wrong in thinking that these two documents indicate a clear intention of The Crummer Company to continue to do business in the State of Florida and to show a contempt of the proper authorities who are required to supervise the securities business?". The letter continues to say that Ball has not seen a copy of the Inverness Contract. " * * * but, of course that would be an easy matter for the proper officials to obtain" (R. 2138). The time, place and manner of the discovery of these documents is fixed after January, 1947 (R. 2133-2139). R. E. Crummer & Company had not the slightest knowledge of the efforts of Mr. Ball in 1942 to cancel its license (R. 2139). And plaintiffs never heard of Ball's activities in connection with the Inverness contract (R. 2139). Of course, as we now know, Ball's suggestion that the Inverness contract be obtained by the "proper officials" was the exact action that the Commission took on June 19, 1943 (R. 1812-1813) and Ball's suggestion that the Inverness contract and Special Act show a clear intention of The Crummer Company to continue to do business and contempt for the authorities

is the reason for both the quo warranto proceeding to oust The Crummer Company and for the license denial. These official moves occurred within two weeks of Ball's unknown letter (R. 1812-1813). *Thus the true story is contrary to the alleged facts given to plaintiffs in 1943.*

Defendants argue, of course, that the information which came to plaintiffs in January of 1943 is notice enough of Ball's letter of January 14, 1943, and the same argument is made as to the rumor of his appearance before the Commission in February of 1943. Thus, they argue that the Statute of Limitations began to run as to all damage resulting from the entire Florida Securities Commission episode. This argument is superficial. While the information that came to plaintiffs was sufficient to call for inquiry, plaintiffs did make the required investigation through an attorney who was obviously knowledgeable in affairs of state government. Plaintiffs were effectively confronted by perfect official minutes to the effect that the cause of the denial lay in the Inverness contract and in the reason stated by the minutes. Two prominent state officials personally confirmed the reasons set forth in the minutes and all three of them swore to the same effect again in February 1946. The Attorney General and Comptroller both disclaimed any contact or influence from Ball. Accordingly, the litigation in the Florida Supreme Court tested the legal sufficiency of the Commission's official reasons. Plaintiffs and their attorneys testified that they accepted these official reasons, and they could not do otherwise. But the later discovery of the Ball letter of May 29, 1943 showed that the official reasons were also proposed by Ball.

Plaintiffs' allegations are that the members of the Commission, acting under the influence of the defendants, issued false information to plaintiffs designed to mislead plaintiffs with the effect of concealing from plaintiffs the true reasons for their action, which conduct did mislead as to the influences and inducements which actuated the

Commission and the identity of persons who had actually caused the denial (R. 60). In the amended complaint plaintiffs further allege that defendants induced the Commission to officially and publicly base its denial of said application "upon a spurious ground having no direct connection with any alleged overt acts" (R. 90).

From the surprisingly close coincidence between Commission action and the Ball letter of May 29, 1943, which plaintiffs are now able to show, plaintiffs are entitled to go to the jury, not only on the claim that he effectively induced the license denial, but also that he likewise effectively induced the surrounding concealments and is responsible for them. Bearing upon this issue is the secret meeting, the misrepresentation, and the totality of conspirators' efforts to conceal their use of public authority to effectuate the conspiracy. It cannot be said that as a matter of law plaintiffs and their attorneys ought to have disbelieved the official and solemn word of the Commission and its members.

g. *Pasco County*

The Pasco litigation is the suit which was filed against plaintiffs in 1944 upon allegations of fraud and overreaching on the part of the two Crummer companies (R. 64) and ended in 1948 upon Court findings that one of the plaintiffs there, Walter Gall, knew or should have known that the charges of fraud and overreaching could not be sustained and that the suit was brought in bad faith (R. 65).

Walter Gall, who was the taxpayer plaintiffs in the Pasco case, and Cummer Sons Cypress Company, a taxpayer contributor to that case, were originally named as defendants in the present antitrust suit. These two defendants were dismissed on the pleadings by the court below on September 2, 1953 (R. 450). The dismissal was affirmed as to these two defendants by the Court of Appeals, 223 Fed. 2d 238, 245.

However, the trial court's dismissal order expressly did not foreclose plaintiffs from introducing evidence as regards the other defendants in connection with the Pasco case. The court's formal Order of September 8, 1954 (R. 452-453) reads as follows:

> "9. The motions to dismiss the actions as to the defendants Cummer Sons Cypress Company, a Corporation; and Walter R. Gall, is granted and the action is hereby dismissed as to those defendants, provided, however, that the dismissal of those defendants shall in no way limit the scope of the evidence and shall not otherwise prejudice or impair the parties' rights to introduce evidence in respect of acts with which the dismissed defendants, Cummer Sons Cypress Company and Walter R. Gall, or either of them, may have been connected."

As to the Pasco litigation, plaintiffs had no knowledge at the time it was filed that any persons were involved, other than the named plaintiffs in that case (R. 2164). In February 1946, plaintiffs learned that the defendant Fuller had provided the investigations and information behind the case (R. 2164). Specifically there was no notice that the Ball-duPont or Leedy-Pierce defendants had anything to do with it (R. 2166).

In 1945, plaintiffs caused Paul E. Raymond, a practicing attorney and former law school dean (R. 2895) to make an extensive investigation of the Pasco litigation (R. 2896-2899). This investigation included extensive inquiries with state officials (R. 2897) and of the McCarran Committee (R. 2898) and persons who knew anything about the bonds involved, the case or the reasons for instituting the suit (R. 2897). The results of his investigation are set up in the answer which he filed in the Pasco case on behalf of one James O. Wynn.

Defendants in this case objected to testimony by Raymond as to the matters he learned (R. 2901) and the

court sustained the objection on the ground that the answer which he filed in the Pasco case itself is the best evidence (R. 2901). But there is other evidence, that Raymond uncovered nothing implicating the private defendants in this case (R. 2166).

Reference has been made earlier to the fact that the February 1946 hearings of the McCarran Committee adduced much testimony that Giles Patterson took no part in any anti-Crummer activities (See pages a16-a20 of this Appendix) and to the fact that he testified that he advised the Governor that there was nothing in the Fuller reports which he reviewed justifying action against the Crummer companies. In the trial below, plaintiffs adduced two letters pertaining to this matter wherein Patterson recommended suit for accounting in the Pasco case (Plaintiffs' Ex. #50, R. 3334-3338; 3336-3337). The other letter contains a discussion by Patterson as to whether it would be better to litigate the Pasco case in federal court (in the Lathrop suit referred to in the original complaint (R. 63) or whether it would be better to file a new suit in state court where the State Supreme Court might look favorably upon it (Plaintiffs' Ex. #49; R. 3331-3333).

As the original complaint shows,[e] the ultimate decision was to file the litigation in the state court. In the face of the February 1946 testimony, plaintiffs did not know and could not know the facts behind this litigation and its relation to the other activities of the defendants in this conspiracy.

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e The Pre-Trial Order of September 25, 1956, rendered proof of the conspiracy unnecessary and also proof that plaintiffs suffered damage from it (R. 501-502). Thus the merits of case were excluded from the trial by the court (R. 1128; 2100; 2043). However, the sequence of events after May 1941 is partially shown. After the lodging of the Main-Wheeler complaint, the Post Office Department promptly notified the SEC that it had a fraud case concerning R. E. Crummer & Company (R. 3143) and correspondence ensued (Plaintiffs' Ex. #9, R. 3144). In November 1941, the SEC representatives appeared in the Crummer offices at Orlando. Later, in 1942, the SEC and Post Office Inspector E. J. Mansfield estab-

lished a joint investigation which Fuller described as a common effort that included himself (Plaintiffs' Ex. #29, R. 3245-3247).

Alexander Brown, an SEC attorney-investigator, and E. J. Mansfield, the postal inspector, two of principal developers of the criminal cases, both testified expressly or in substance that they had no acquaintance with the municipal bond field when they began work on the Crummer case (R. 2007; 1277).

The Post Office Department investigation made little progress until Mansfield began work on it on September 2, 1942 (R. 1375-1376). On that date, and before Mansfield had done any work on the case or knew anything about the municipal bond field, he was contacted by Fuller (R. 1308; 1323; 1329). A Fuller to Archie Clement letter from the Fuller deposition production states that on that date Mansfield stated he had found sentiment in "many places" (the quotation marks on this phrase are Fuller's)—and the sentiment was, as Fuller put it: "for action along the lines we contemplate." Fuller and Mansfield then agreed that Fuller would prepare a series of summaries, for Mansfield believed it possible "to greatly widen the nature of the case and work up an action based on widespread fraud and collusion" (R. 3245).

Fuller's recitals of that day proved accurate. A Mansfield letter to his superiors, from the Post Office production of documents during the Mansfield deposition, dated November 21, 1942 (Plaintiffs' Ex. 51, R. 3338) matches the prediction (R. 1332). On that date, Mansfield formally requested the broadened authority which he obtained (R. 1333).

At the same conference, Mansfield was advised of the Patterson idea for a broad suit for accounting against the Crummer companies. As to another Crummer refunding, Martin County, Florida, Mansfield requested Fuller that nothing be done about Martin County until it be determined what role Patterson would play, if any (R. 3246).

Plaintiffs showed at least 10 established visits by Mansfield to the Patterson law office (R. 2367-2371), a fact revealed during the Mansfield deposition by the Ball-duPont defendants themselves (R. 2364). And plaintiffs offered three letters from the Post Office Department documents from Mansfield to his superiors for comparison with three letters by Patterson, one located during the massive rummaging operation through files in the State capitol building, or produced by the Ball-duPont defendants in pretrial depositions (R. 2356-2363). These letters, plaintiffs claim, show a concurrence of factual and legal material and ideas which fairly support the conclusion that these Patterson materials were utilized by Mansfield, a novice in the field, in the development of his investigation and ensuing prosecution. Alexander Brown testified by deposition that there were at least some Patterson legal materials in the SEC files (R. 2015).

Plaintiffs offered to show how the Lee County refunding was earmarked by Mansfield and the SEC as proof in support of the Kansas indictments to show the alleged scheme, but these were regarded by the court as beyond the purview of the separate trial (R. 2041-2044).

The record also shows some of Fuller's damaging "expert" testimony (R. 2266) in July 1944 to the Kansas Grand Jury during which Fuller advised those citizens that the sovereign State of Florida had refused The Crummer Company a license to do business (R. 2269). Fuller falsely represented that the license denial was still in litigation (R. 2270). Of course, before the Kansas Grand Jury there was no inkling in Fuller's testimony that Edward Ball had caused that denial (R. 2270).

The effectiveness of this two-pronged attack is obvious. Plaintiffs may rightly infer that the dual approach was in the consciousness of the conspirators. Even Mansfield, on the very first day of his contact with the case advised Fuller to "acquaint Larson with our plans" (R. 3246). Why a postal inspector about to investigate a fraud case would want Larson, a member of the Florida Securities Commission, to be advised of the impending events is for determination on the merits and for comparison with Edward Ball's approach to the Commission a few weeks later.

In 1946, the Federal indictments were dismissed after review by a panel of five Justice Department attorneys to avoid a "grave miscarriage of justice" (R. 3224-3234).

APPENDIX F

Pertinent excerpts from the decision of the United States Court of Appeals for the Fifth Circuit of which review is sought by the petition for writ of certiorari, 255 F. 2d 425, entered May 8, 1958.

The following excerpts are findings of fact by the Court of Appeals with reference to lack of knowledge on the part of respondents (begins 255 F. 2d, pages 428-431):

"After a trial lasting four weeks, the case was submitted to the jury which deliberated for an hour and forty minutes one day, and for two hours and five minutes the next morning. Thereupon, the jury then being in disagreement, the court directed a verdict in favor of the defendants on the issue of fraudulent concealment. Such order is supportable, of course, only if there was no genuine issue of fact which the jury could have resolved in favor of the plaintiff.

Fraudulent concealment as a basis for tolling the statute of limitations comprehends two elements: successful concealment and fraudulent means. If in fact the alleged efforts of defendants to conceal their activities adverse to appellants' interests were not successful,

that is, if in spite of such efforts appellants did learn of the existence of such a conspiracy resulting in their damage more than three years before suit, then it would not be necessary to inquire into the motivations back of appellees' efforts to conceal. We first consider then whether appellants carried their burden of making a prima facie showing that they lacked knowledge of the conspiracy.[2]

In order to prove lack of knowledge of the conspiracy due to fraudulent concealment the appellants did undertake to prove many facts relating to the conspiracy itself. Favorable to this position, the jury could find from the evidence, documentary and oral, the following; Following 1929 there was keen commercial rivalry between Crummer and the Ball interests; the financial fortunes of Ball were in some measure jeopardized by the refunding operations identified with Crummer; this led to an announced declaration by Ball to fight it out with Crummer on the taxing unit bond field in Florida; in 1941 Roger Main, an official of Ball, and Howard S. Wheeler, of Leedy, Wheeler & Co., brokers having a lucrative relationship with Ball, went to the office of the Chief Post Office Inspector in Washington and filed

[2] Since upon the trial of this one issue the existence of the conspiracy as charged is assumed, we shall hereafter refer to **the conspiracy** in that sense, although such reference in no way implies that there has been a finding that such a conspiracy did in fact exist.

charges of mail fraud against Crummer;[3] this initiated an investigation by the Post Office Department and the Securities & Exchange Commission that ultimately resulted in mail fraud indictments in Kansas City, Missouri, in August 1944; in the meanwhile the Florida State Legislature set up an investigating committee which used defendant Walter P. Fuller as investigator; Fuller closely collaborated with Ball and Federal agents to the end that highly unfavorable reports were made in the committee's report; assistance was given by Fuller in the investigation resulting in the indictments; Ball wrote a letter on November 16, 1942, to the Florida Securities Commission requesting the cancellation of Crummer's license. That letter indicated knowledge of activities of Crummer uncovered by Fuller that Fuller later testified were secret; such activities were cited by Ball in his letter as grounds for revoking Crummer's license. The existence of this letter was not known to appellants until January 1947; on May 29, 1943, Ball wrote another letter to the Florida Securities Commission challenging Crummer's right to act as agent for the City of Inverness, as authorized by a special act of the legislature; the existence of this letter was also unknown until January 1947; this letter was shortly followed by a quo warranto proceeding brought by the state to prevent Crummer's acting; it was ultimately won by Crummer.

At about this same time Crummer applied for a license before the Securities Commission; he knew that Ball-duPont was opposing this application, but on making what amounted to prodigious efforts to find out if in fact Ball-duPont's opposition was, in any way, responsi-

[3] We depart from the chronological statement of fact here to state that the fact that Main and Wheeler actually made representations to the Post Office Department was not known by appellants until December 27, 1946, within the period of three years from the filing of the suit. This is agreed to by everybody. It is in effect claimed by appellants to be the main support of their claim of lack of knowledge.

ble for the denial of his license and the bringing of the quo warranto suit he was assured by the officials that this was not so; application for license was denied, but Crummer litigated for it and won; in 1944 the Pasco County litigation was commenced, ostensibly by the state, but actually by one Gall, with full knowledge and collaboration with attorneys of appellees; this suit severely attacked Crummer and his operation.[4] In an answer to the Pasco County suit by one Wynn, an intervenor, which answer was fully approved by appellants, it was charged that the suit had been brought as part of a conspiracy between Fuller and others to destroy appellants' business in Florida. Inasmuch as this answer, filed on September 30, 1946, is one of the strongest bits of documentary evidence bearing on the issue of appellants' knowledge of the conspiracy later sued on, we here quote relevant portions of it:

> "The said defendant further states that this suit was instituted in bad faith and with improper motives, and has been so prosecuted to this date as part of a well planned and determined conspiracy and scheme to defeat the defendant, R. E. Crummer and his company's municipal refunding operations in Florida, with the object of eliminating them as a factor in Florida municipal finance, in that, to-wit:
>
> "a. This proceeding is in fact one of a series of attacks made in the Courts, before the United States Securities and Exchange Commission, the Post Office Department, the Florida Securities Commission, the Florida State Board of Administration, and elsewhere by the individuals who, actuated by bad faith and improper motives, procured the institution of the suit in furtherance of the scheme of the said individuals to frustrate,

[4] This suit, too, was finally won by Crummer.

disrupt, and if possible, defeat any and all efforts, operations and activities in the State of Florida, of the defendants, R. E. Crummer and R. E. Crummer and Company.

"b. In January, 1943, one, Walter P. Fuller, of St. Petersburg, Florida, and others prevailed upon the State Securities Commission to deny the application of The Crummer Company for a license to do business within the State of Florida, resulting in the necessity of The Crummer Company's procuring writs of mandamus from the Florida Supreme Court in two successive years in order to obtain a license to do business.

. . . .

"j. During the greater part of the period in which the plaintiff, Walter R. Gall, and Walter P. Fuller were busily engaged in promoting this litigation, agents of the Securities Exchange Commission and Post Office Inspector Mansfield were conducting a nationwide investigation of the refunding operations in Florida of R. E. Crummer and Company and its officials and employees, including a complete investigation of the Pasco County 1938 refunding plan. The said Gall and Fuller were working in conjunction with the federal agents not only in Pasco County but elsewhere. The general scheme and conspiracy reached the zenith when criminal indictments were returned against R. E. Crummer, his company, and others by a federal grand jury of the District of Kansas, in August of 1944. The said Gall and Fuller and others of Florida cooperated toward the finding of the indictments with Fuller personally appearing before the federal grand jury in Kansas. . . ."

In an effort by Crummer to cause the indictments to be dismissed (as they ultimately were), their counsel prepared a written statement which was filed on February 25, 1946. This statement contained a detailed history of Crummer's activities and the opposition of the Ball-duPont interests. It is counted on so heavily by appellees as showing conclusively that appellants knew of the conspiracy for more than three years before suit was filed that we quote it at some length in the margin.[5]

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[5] After stating that "The duPont interests apparently concluded that they had to wage war if their selfish plans, dreams, etc. were to reach fruition on Crummer," the statment also said:

"The duPont interests failed in their fight in the Florida Legislature for they were fighting not only Crummer but the people of the state; they failed in their fight against the enactment of the amendment to the Federal Municipal Bankruptcy Act, because of the over-whelming support urging its enactment; and they failed in their fights in the courts because the merits were against them.

"However, when the agents of the SEC and Post Office Department moved in and took over the front line of attack upon Crummer the course of the battle changed. The potent forces of the Federal Government were too much for Crummer. He was compelled to retreat. And, as a result, for all practical purposes Crummer was eliminated as the prominent figure in the field of Florida public finances. Immediately the duPont interests assumed the position of prominence to such an extent that there now exists a duPont public credit monopoly in Florida. For example: While Crummer was permitted to function in Florida the duPont interests were able in open competition to obtain not more than one-fourth of the authorized refunding bonds, but, since Crummer's elimination the duPont interests and associates have purchased about seventy five per cent of the volume authorized for which they tendered bids.

"I realize that the Department of Justice is not interested in the success or failure of competitors in any field of endeavor, but I am certain that it is extremely interested in determining whether or not its authority is being used by others as a vehicle to persecute one competitor at the behest of another, and especially where it appears that the competitors have entered into the some type of contract and only one, in the field of many, stands criminally charged."

So, too, in January 1947, within the three years limitation period, in a letter to the Department of Justice, Crummer himself recited much the same history and made much the same statement, from which it could be implied that prior to June 30, 1946, he knew of many of the facts that ultimately became the basis of his suit.

These facts are supplemented by the testimony on behalf of Crummer, both by him and Mr. Meredith as well as several lawyers who had made diligent investigation into the several adverse actions taken against Crummer by the state and governmental agencies, all to the effect that they had been unable to connect the appellees, other than Fuller, with any conspiracy to cause the state and federal action; that the first time they were able to do so was on December 27, 1946, when they learned that the initial complaint to the Post Office Department had been made by Main and Wheeler, the former being an official of Ball-duPont and the latter a partner in Leedy, Wheeler & Co. of the Leedy-Pierce group.

It is thus appellants' contention that although they knew they were being opposed and bitterly fought on many fronts by several of the parties who were later joined as defendants in this suit, they were unable to learn of the connection between them that was essential to the existence of a conspiracy until the discovery of the Main-Wheeler activities. Appellants also contend that the discovery of two letters from Ball-duPont to the Florida Securities Commission which came to light within the three year period gave further substantial information tying Ball-duPont into the activities of Fuller and his investigating committee."

APPENDIX G

Summary of the Evidence and Collation of the Pleadings as Presented to the Court of Appeals in Respondent's Brief

The Amended Complaint on Fraudulent Concealment

Paragraph 43 of the original complaint (R. 69-71) alleges that the defendants concealed their conspiracy, overt acts and identities by contriving means by which the various unlawful infringements on plaintiffs' rights were either wholly concealed or were made to appear to be merely coincidental. Defendants acted under color of purported public authority skillfully employed as "the only visible instrumentality" by which plaintiffs were damaged (R. 70).

The amended complaint, which has been held sufficient by this Court, adds a new Paragraph 48, entitled "Concealment" (R. 82-88).

A new Paragraph 49 of the amended complaint sets out the details of plaintiffs' diligence (R. 88-92).

A new Paragraph 50 sets out the time, place and nature of the discoveries made by plaintiffs (R. 92-97).

Under Paragraph 48, "Concealment", plaintiffs allege: 48(a)—that the Ball-duPont-Leedy-Pierce, defendants, secretly conspired in January 1941; 48(b)—that their scheme was to induce criminal indictments of plaintiffs and to utilize a State Legislative Committee for the actual purpose of inducing false charges by the State and for the purpose of influencing federal agencies; 48(c)—that in May 1941 Main and Wheeler filed an accusation of fraud. In the same months the defendants caused the Florida Legislative investigation; 48(d)—that the federal and state investigations were intended as a single scheme; 48(e)—that the scheme was self-concealing in the use of public authority (R. 82-83).

Section 48(f) sets out some of the specific initial acts of concealment: 48(f)(1)—that defendants agreed on a false charge involving Lee County, to be filed under the direction of Main, a former FBI investigator; Main was selected because he had no known connection with the municipal bond business, and, especially with Lee County, Florida, bonds, but knew how to set federal investigatory machinery most effectively in motion; 48(f)(2)—that the charge would be tendered anonymously to preserve security; 48(f)(3)—that the charge would be filed in Washington, D.C., not Jacksonville, Florida, for security reasons; 38(f)(4)—that being unable to proceed anonymously, defendants agreed that Main would sign the formal transmission document on his personal letterhead instead of the letterhead of the defendant St. Joe Paper Company, of which he was then a senior officer; 48(f)(5)—that defendants utilize a letter of the Lewis State Bank of Tallahassee, Florida, in aid of the charge, without its knowledge, to make the Lewis State Bank a nominal accuser of plaintiffs; 48(f)(6)—that Main thereafter avoided further contact to preserve security (R. 83-86).

48(g)—Later Ernest J. Mansfield of the Inspection Service of the Post Office Department and the defendant Walter P. Fuller, and others, knowingly entered the conspiracy and participated in specific acts in furtherance of the prosecution, and joined in the above concealments (R. 86).

48(h)(1)-48(h)(2)—detail that in testifying under oath before a certain United States Senate Committee in 1945, 1946 and 1947, defendants and others joined in testifying under oath in a manner which concealed the facts from plaintiffs (R. 86-88). Included among these were the defendants Edward Ball, Roger Main and Clyde C. Pierce, who not only falsely denied their conspiratorial influence on the federal investigation, but denied that they were secret co-principals in bond refunding contracts.

At all times before December 27, 1946, both the Post Office Department and the SEC refused to reveal the identity of plaintiffs' accusers to anyone, including plaintiffs and a Subcommittee of the Committee on the Judiciary of the United States Senate (hereinafter frequently referred to as the "McCarran Committee") (R. 88).

It is the position of plaintiffs that they substantially proved the above allegations of their First Amended Complaint as well as the time, place and manner of their first partial discoveries of the true facts from and after December 27, 1946, as well as their allegations of diligence and lack of knowledge with reference to the identity and activities of the conspirators.

Certificate of Service

I hereby certify that copies of this brief have been served by air mail, postage prepaid, upon each counsel for the petitioners, this_____day of October, 1958.

_____

Attorney (Member of the Bar of the Supreme Court of the United States)